Supreme Court of the United States

OCTOBER TERM, 1964

No. 33

ARABIAN AMERICAN OIL COMPANY,
Petitioner,

vs.

HOWARD FARMER.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITIONER'S BRIEF.

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PETITIONER'S BRIEF.

The Honorable Edmund L. Palmieri of the United States District Court, Southern District of New York, delivered two opinions awarding costs in favor of petitioner after the first trial. They may be found at pages 28 and 33 of the Transcript of Record.[1] The Honorable Edward Weinfeld of that court after the second trial delivered an opinion awarding costs in favor of petitioner. It may be found at 31 F. R. D. 191 and at T 53.

The Court of Appeals for the Second Circuit delivered an opinion reversing and remanding so as to allow certain of the costs taxed by Judge Palmieri after the first trial but disallowed by Judge Weinfeld, and in addition allowing the costs taxed by Judge Weinfeld. The majority opinion and dissenting opinions are found at 324 F. 2d 359, *et seq.* and at T 66, *et seq.*

The judgment of the Court of Appeals sought to be reviewed was entered November 6, 1963 (T 86).

[1] Hereinafter the Transcript of Record will be referred to as T. followed by the page number.

Jurisdiction.

The statutory provision conferring jurisdiction on this Court is Title 28 of the United States Code, §1254(1).

On March 9, 1964, this Court entered an order (376 U. S. 942) granting the petition (No. 808) submitted by Arabian American Oil Company (Aramco) for certiorari to the United States Court of Appeals for the Second Circuit as well as the petition (No. 804) submitted by Howard Farmer (Farmer) and consolidated the proceedings for argument.

Questions Presented.

1. Should not a federal court's discretión with respect to the taxation of witnesses' travel expenses as costs against the unsuccessful party be directed solely to a determination as to whether or not the oral testimony of such witnesses at the trial was material and necessary?

2. Does not a federal trial judge have the authority under Federal Rule of Civil Procedure 54(d), 28 U. S. C. §1920 and 28 U. S. C. §1821 to tax against the unsuccessful party the total travel expenses of material and necessary trial witnesses, regardless of distances travelled to and from the place of trial?

3. Would it not be an abuse of discretion for a federal district judge under Federal Rule of Civil Procedure 54(d) and 28 U. S. C. §1920, to refuse to tax as costs against the unsuccessful plaintiff the travel expenses of defendants' witnesses who travel from distant places to the place of trial:

A. In an action in which a plaintiff bases his entire case on testimony concerning events in a distant part

of the world and effective rebuttal depends on the live oral testimony of witnesses from such distant places?

B. In an action in which a jury finds in effect that that testimony of plaintiff, which defendant had to rebut through live testimony, was false?

C. In an action in which plaintiff changes at trial the testimony which he had given at an examination before trial or at a previous trial?

4. Is it not an abuse of discretion for a federal district judge to limit the amount of witnesses' travel expenses taxed as costs against an unsuccessful party on the basis of the relative financial resources of the parties?

5. Where there have been two trials of an action before different judges of a federal district court, neither trial resulting in a judgment for plaintiff, is it not an abuse of discretion for the judge on the second trial to review and re-assess the costs taxed by the judge on the first trial?

6. Was the Court of Appeals not in error when it failed to affirm the award of costs made by Judge Palmieri at the first trial on the basis of the incremental costs to Aramco of transporting two necessary and material witnesses to and from the place of trial on its own planes?

7. Is not a federal district court judgment appealable even though it is solely for costs where the issue is whether there was an abuse of discretion by the trial judge taxing costs and this issue requires the resolution of fundamental questions regarding the interpretation and construction of statutes and specific rules of law?

Statutes Involved.

Rules 26(d)(3), 37(c), 45(e)(1) and 54(d) of the Federal Rules of Civil Procedure are set forth at pages 1a and 2a of the appendix. 28 U. S. C. §§1821, 1915, 1920, 1924 and 1925 are set forth at pages 2a-5a of the appendix. The Act of September 24, 1789, c. 20, §30 (1 Stat. 88), of March 2, 1793, c. 22, §6 (1 Stat. 335), and of February 28, 1799, c. 19, §6 (1 Stat. 626) are set forth at pages 5a-8a of the appendix. Admiralty Rule 47 and New York Southern and Eastern District Local Civil Rule 5(a) are set forth at page 8a of the appendix.

Statement of the Case.

A. District Court Proceedings.

Farmer commenced this action in the Supreme Court of the State of New York, New York County. The action was removed by Aramco to the United States District Court for the Southern District of New York upon the grounds of diversity of citizenship and the involvement of the requisite jurisdictional amount.

Farmer, an ophthalmologist, sued Aramco for $160,000. (T 6).[2] The amended complaint alleged that Farmer was hired by Aramco "for the duration of defendant's operation of its oil wells in the Kingdom of Saudi Arabia" (T 2). Farmer claimed that he was wrongfully discharged prior to the end of this period (T 2) and that in almost six years after his discharge by Aramco, he earned almost nothing (R II-179 *et seq.*[3]).

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[2] Increased from $4,000 by amendments to the original complaint.

[3] Reference to Volume and page of record on appeal to the Court of Appeals for the Second Circuit, as certified by the Clerk of the Court of Appeals.

Aramco by its answer denied that Farmer was hired for the term alleged (T 3), maintained that Farmer was hired for no term, but at will, and that no one in its employ had authority to hire for the term alleged by Farmer. Aramco further maintained that Farmer had been discharged for good cause (T 4).

The case was tried for the first time before Judge Palmieri and a jury, resulting in a disagreement among the jurors. Judge Palmieri then dismissed the complaint as a matter of law, primarily on the ground that the alleged employment contract, being oral, was invalid under the New York statute of frauds (176 F. Supp. 45). Costs of $6,601.08 were then awarded to Aramco, including travel expenses of witnesses, expenses for transcripts of pretrial hearings, examinations before trial and depositions, stenographic fees for daily transcripts of the minutes of the trial, and the costs of making photostats of relevant exhibits (T 8-34). With regard to travel expenses the award included lowest cost first-class air passage round trip between Saudi Arabia and New York for witness Elias Faddoul (Faddoul), the expense of transportation by Aramco plane round trip between Saudi Arabia and New York for witnesses Dr. Robert C. Page (Page) and Marjorie Catherine Swanson, R.N. (Swanson), the lowest cost first-class air passage round trip between Wilmington, Delaware and New York for witness Alice Neal, R.N. (Neal), and the lowest cost first-class air passage round trip between Columbus, Ohio, and New York for witness Dr. Richard L. Meiling (Meiling). The testimony of each of these witnesses was material and necessary for Aramco to rebut Farmer's contentions as hereafter discussed.

Judge Palmieri's decision, dismissing the complaint, was reversed by the Court of Appeals (277 F. 2d 46) and

the case was remanded for a new trial. The Court of Appeals held that the alleged employment contract was not unenforceable under the New York statute of frauds[4]. A petition for certiorari submitted by Aramco was denied by this Court (364 U. S. 824).

Prior to the second trial Aramco made a motion to require Farmer to furnish an undertaking for costs on the basis that Farmer resided outside the jurisdiction and that he might not have sufficient assets in the jurisdiction to satisfy a judgment for costs if Aramco was eventually successful in the litigation. The motion was granted by the Honorable Richard H. Levet of the District Court. Thereafter the action was dismissed by the Honorable Lloyd F. MacMahon of the District Court, for Farmer's failure to furnish the required undertaking. The Court of Appeals reversed the decisions of these two district judges for the reason that to require a substantial security for costs would "put an arbitrary and unbending clog on suits by one of its [United States'] own citizens merely because he does not have the good fortune to live in New York." 285 F. 2d 720, 722 (2nd Cir. 1960).

The case was tried a second time before Judge Weinfeld and a jury. A verdict was returned for Aramco.

The clerk of the court thereafter taxed costs of $11,900.12 for Aramco's expenses on both the first and second trials (T 35, *et seq.*). On motion by Farmer, Judge Weinfeld reduced this amount to $831.60, limiting to $16.00 for both the first and second trial the amount taxable for the travel expense of each Aramco witness to and from the place of trial. Judge Weinfeld also disallowed *in toto* certain costs taxed by Judge Palmieri on the first trial,

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[4] The Court of Appeals reversed itself on this point just 3 years later in *Perrin* v. *Pearlstein*, 314 F. 2d 863 (C. A., 2nd Cir. 1963).

including expenses for transcripts of pre-trial hearings, examinations before trial and depositions, stenographic fees for daily transcripts of the minutes of the first trial, and the expenses of making photostats of relevant exhibits, and refused to tax costs incurred on the second trial for similar expenses. (T 53, *et seq.*; 31 F. R. D. 191).

With regard to transportation of witnesses Judge Weinfeld held that costs were allowable at 8¢ per mile for only 100 miles to and from the place of trial for both witnesses transported to and from New York on Aramco's own planes and witnesses transported to and from New York by commercial airline. Specifically Judge Weinfeld reduced to $16.00 the cost, assessed at $1,531.50 by Judge Palmieri, of transporting Faddoul by commercial airline from and to Saudi Arabia for the first trial; reduced to $16.00 respectively for each witness the cost, assessed by Judge Palmieri at $1,032.00 for each witness, of transporting Page and Swanson from and to Saudi Arabia on Aramco planes for the first trial; reduced to $16.00 the cost, assessed by Judge Palmieri at $21.46, of transporting Neal by commercial airline from and to Wilmington, Delaware for the first trial; reduced to $16.00 the cost, assessed by Judge Palmieri at $74.25, of transporting Meiling by commercial airline from and to Columbus, Ohio for the first trial; and limited in each case to $16.00 the cost on the second trial of transporting by commercial airline Faddoul from and to Beirut, Lebanon, Dr. Frank Born (Born) from and to Saudi Arabia, Swanson from and to Tacoma, Washington, Neal from and to Wilmington, Delaware and Meiling from and to Columbus, Ohio (T 61, *et seq.*).

In his opinion Judge Weinfeld did not find the witnesses' presence at trial unnecessary but placed particular emphasis on the "great disparity in the financial resources

of the parties" and limited Aramco's travel expenses for witnesses because Aramco was a "rich litigant" (T 54, 55; 31 F. R. D. 193, 194).

Judge Weinfeld also concluded that Aramco was extravagant in transporting live witnesses to trial, that the cost of obtaining the personal attendance of the witnesses was disproportionate to the financial amounts involved in the litigation and that Aramco was unreasonable in using live witnesses rather than depositions (T 54, 57; 31 F. R. D. 193, 195). It will be seen that each of these conclusions is clearly erroneous in light of the sharp and serious factual questions raised by Farmer's claims and resolved against Farmer by the jury.

B. Farmer's Claim as to the Reason for his Discharge.

Farmer claimed that he was discharged because he insisted "on reporting honestly and truthfully and in accordance with his conscience the results of his findings of trachoma" (R II-1007). Trachoma is a dread eye disease common in tropical climates. It leads to blindness and there are many horrifying examples of it among the natives in Saudi Arabia (R II-98, *et seq.*).

Farmer claimed that an alarming number of American personnel employed by Aramco in Saudi Arabia were contracting this disease (R II-102, *et seq.*). He claimed that Aramco's Medical Director (Page) and Associate Medical Directors (Allen and Born) "bullied or badgered or intimidated [me] into falsifying or suppressing my findings" (R II-1013; see R II-102, *et seq.*) and that he was discharged because he refused to do so. Farmer claimed that the reason he was badgered by the doctors who were his superiors was to protect the company financially from workmen's compensation claims and from the consequent deterrent in obtaining American personnel to work in Saudi Arabia.

Aramco maintained that American personnel in Saudi Arabia were not contracting trachoma and that its doctors, contrary to Farmer's testimony, had always urged Farmer to make truthful diagnoses (see R II-789, *et seq.*). Furthermore Aramco established it had spent over $500,000 on research studies on trachoma. (See R I-130, R II-222, 223).

The gravity of Farmer's claim is readily apparent. A factual situation was alleged where a dread eye disease causing blindness was occurring among American personnel employed by Aramco in Saudi Arabia and that not only was Aramco doing nothing to prevent the spread of trachoma or to cure the personnel so afflicted but that Aramco was wilfully suppressing and falsifying the facts with reference to it. It was therefore essential that Aramco produced the witnesses at trial who could testify that Farmer's charges concerning trachoma were completely baseless. Those witnesses were Aramco's Chief of Surgery, Dr. Lohnaas, Aramco's Medical Director, Dr. Page, Aramco's Associate Medical Director, Dr. Allen, and Aramco's Assistant Medical Director, Dr. Born.

In addition, Farmer's allegations regarding trachoma seriously questioned the professional competence and integrity of Doctors Lohnaas, Allen, Page and Born. Farmer's accusation with reference to these doctors was that they attempted to badger and intimidate him into making false diagnoses. Farmer's lawyer stated in his summation:

> "We are shouting it from the housetops. Dr. Farmer was discharged because he wouldn't be bullied and intimidated into abandoning his conscience and falsifying and suppressing reports, and I don't want there to be any mistake about this being a suggestion. This is the reason and the sole reason and the only reason why Dr. Farmer was discharged." (R II-1008).

To rebut this charge it was essential that Dr. Lohnaas, Dr. Page, Dr. Allen and Dr. Born testify at trial where their credibility could be weighed against that of Farmer.

Judge Weinfeld's conclusion that Aramco was extravagant in transporting live witnesses to trial in that the cost was disproportionate to the financial amount involved in the litigation must be assessed on the basis of the foregoing facts. If Farmer had sued for only a nominal sum, Aramco would have been required and fully justified, whatever the cost, to disprove Farmer's charges: (1) that trachoma was prevalent among its American personnel in Saudi Arabia; (2) that Aramco urged Farmer to falsify his reports; (3) that its chief medical officers had urged Farmer to make false diagnoses and (4) that Farmer had been discharged for his refusal to make such false reports and diagnoses. These are extremely serious allegations, and the reasonableness of witnesses' travel expenses incurred in disproving them cannot be measured solely by the amount sued for—even though that amount was not small, $160,000.00.

C. Aramco's Claim as to the Reason for Farmer's Discharge.

Aramco maintained that Farmer was discharged because he performed a non-emergency operation under general anesthesia on a 4½ year old Arab boy without having first received the results of a blood count and urinalysis. Aramco maintained that the blood and urine had been taken and that the tests were in process but that Farmer refused to wait a few minutes for the results and continued with the operation in an excited and angry condition (e.g., R II-583 [Swanson]). Aramco maintained that this violated not only an express rule of the hospital (R II-233, *et seq.* [Neal]) but accepted standards of medical practice

(R II-833, *et seq.*). Aramco maintained that this was the true reason Farmer was discharged (R II-272 [Page]).

At his examination before trial, Farmer admitted that he had performed the operation without having received the results of these tests but stated that the results were not necessary since he could tell by looking at the boy that he was in good health (R II-148, *et seq.*). He denied the existence of the express rule of the hospital and that such tests were required by accepted standards of medical practice (R II-151, *et seq.*). Farmer also attempted to prove that Aramco's hospital generally fell short of any such accepted medical standards since it was not yet accredited (R II-405).

In preparation for Farmer's contentions Aramco retained an expert, Dr. Joseph F. Artusio (Artusio), Anesthesiologist in Chief at New York Hospital, Cornell University Medical Center, and Professor of Anesthesiology at the Cornell University Medical College. He testified that such tests were indispensable in conducting an operation under general anesthesia and that to conduct such an operation without them could create a hazard to the patient's life (R II-838). In addition, Aramco offered the testimony of the head nurse of the operating room (Nurse Neal, R II-233) and its Chief of Surgery (Dr. Lohnaas, R II-442) to the effect that a specific rule of the hospital in Saudi Arabia required such tests and that the rule was on the bulletin board outside the operating room. It also produced Dr. Meiling, Associate Director of the Ohio State University Health Center and University Hospital in Columbus, Ohio, where Farmer received his training. Dr. Meiling testified that such a rule existed in that hospital at the time Farmer was there (R II-397) and that Farmer had physically received and signed for a copy of this rule as a condition to the receipt of his pay (R I-619). He also testified to events

occurring at that time indicating Farmer's instability (R I-620, *et seq.*).

During the first trial of this action Farmer, apparently realizing he could not defend the testimony he had earlier given in his examination before trial, for the *first time* testified that he had received the results of the blood count and urinalysis prior to conducting the operation on the Arab boy (R I-110). When asked from whom he received the results he gave the name of a Lebanese nurse employed by Aramco in Saudi Arabia, Mr. Elias Faddoul (R I-116).

Aramco had no choice but to contact Faddoul to see if this *new* testimony was true. Faddoul advised that he had not given Farmer the results of the tests (R I-1210). Note that the *first time* Faddoul's name was mentioned by Farmer was during the course of the first trial (R I-116). This made it necessary that Aramco immediately have Faddoul transported to New York to testify that he had not given the results of those tests to Farmer (R I-1204). The transportation was by commercial airline.

It most certainly cannot be argued that Faddoul's testimony was not necessary or that his trip could have been avoided. Farmer's own last minute change of testimony made the trip unavoidable. Having put Aramco to the expense of disproving his calculated change of testimony, Farmer should reimburse Aramco for this expense. Judge Palmieri allowed this expense at the first trial in the amount of $1,531.50 (T 33), but Judge Weinfeld reduced it to $16.00. (T. 53, *et seq.;* 31 F. R. D. 191, 195).

At the second trial Farmer revised his testimony *yet again* and said that he was unsure whether Faddoul or *another* nurse had given him the results of these tests (R II-208). Note that on deposition Farmer testified he had not had the results of the tests; at the first trial he

testified Faddoul gave him the results. At the second trial his testimony was as follows:

> "Q. And the contents had been conveyed to you by whom? A. A nurse.
>
> Q. And the name of that nurse? A. This is not definite. I believe it was one individual, and I know, Mr. Bordeau, that you are going to turn to the ....." (interruption by a colloquy between the attorneys for the respective parties and Judge Weinfeld).
>
> • • • • • •
>
> "A. (Continuing) It was my impression that it was Elias Faddoul.
>
> Q. Pardon? A. It was my impression that name of the nurse was Elias Faddoul, F-a-d-d-o-u-l.
>
> Q. Isn't it more than your impression that it was Faddoul? Isn't it a fact that you stated that it was Faddoul? A. Now, Mr. Bordeau, you are leading me on the same way as you did before, and I am not going to be led on." (R II-208, 209).

This Court is urged to read R II-148-163 to judge for itself the type of witness Farmer proved to be and the type of claim he made.

Farmer's contradictory testimony on deposition and at the first trial was read and it was once again necessary to call Faddoul from Saudi Arabia. Since Farmer constantly shifted his testimony on crucial points there was no effective way to disprove his changing and serious charges other than by producing the crucial witnesses to testify in person. Aside from the importance of live witnesses in connection with an issue of credibility, it was vital to have live witnesses since it was impossible to predict Farmer's testimony.

Thus, contrary to Judge Weinfeld's conclusion (T 57; 31 F. R. D. 195), there was no way Aramco could counter Farmer's changing testimony without having live witnesses. Aramco could not predict Farmer's testimony and Farmer (without live defense witnesses) was free to say what he chose about events occurring in Saudi Arabia as to which the only witnesses were located in Saudi Arabia or at distant points in the United States. A defendant who failed to produce live witnesses would have been completely victimized by a plaintiff who changed and threatened to change his testimony as to events knowing that the witnesses who were familiar with the truth were at a great distance from the place of trial. A defense counsel who failed to bring such live witnesses where at all possible to the trial would have been unfaithful to his professional obligation to his client.

Nurse Swanson, the anesthetist assigned to the operation in question, testified at both trials that she had refused to participate in the operation without having received the results of the laboratory tests and she testified at both trials that Farmer had stated to her, not that he had had the results of these tests but that he didn't care whether she assisted him or not (R II-583). In this connection Farmer testified at both trials that in substance Nurse Swanson was incompetent as an anesthetist (R I-169, 402; R II-880) and that she had lied concerning what had been said on the day of the operation (R I-399, 405; R II-877, 878). In Farmer's summation considerable time was spent attempting to show that Nurse Swanson lied under oath (R I-1343, *et seq.*; R II-1004, *et seq.*). Nurse Swanson was a vital and important witness whose credibility was vital to the issues in this case, and whose live testimony was both necessary and material.

Dr. Born, Assistant Medical Director of Aramco, testified at the second trial that Dr. Page told him that Dr. Farmer was conducting an operation before receiving the results of a blood count and urinalysis of the patient (R II-531, *et seq.*). Dr. Born testified that he then accompanied Dr. Page to the operating room to find that surgery was already in progress (R II-533) and that it was too late to interfere (R II-542). Dr. Born further testified at the second trial that at the time of Farmer's discharge he admitted he had performed the operation without obtaining the laboratory results, and did so because he did not think it was necessary (R II-524). There could have been no satisfactory substitute for the personal testimony of Dr. Born with reference to these central issues of the case.

Aramco's chief of surgery, Dr. Lohnaas, testified that Nurse Neal reported to him that Farmer was proceeding with the operation without having an anesthetist present (R II-454). Furthermore, Dr. Lohnaas testified that Farmer admitted to him that the results of the tests had not been received prior to the operation (R II-439, 495, 506, 507). Farmer testified in substance Dr. Lohnaas had testified falsely in this respect (R II-872).

Farmer at the second trial (for the *first time*) maintained that the records of the surgery department had been falsified willfully with reference to whether or not the tests had been taken. It was implied that Dr. Lohnaas, Dr. Page and Dr. Born had participated in this fraud (R II-480, *et seq.;* R II-726, 727; R II-804, *et seq.;* R II-992, *et seq.*).

Farmer also testified that at the time of his discharge no reason was given for his discharge. Farmer at the first trial changed the testimony he had given in his examination before trial regarding conversations relating to his discharge and intimated that the discharge was a frameup by

Doctors Page, Born and Lohnaas acting together (e.g.; R I-80 *et seq.;* R I-120 *et seq.;* R II-92 *et seq.*). Hence, the testimony of all three was material and necessary.

A charge that Aramco had falsified its medical records was one which Aramco was obligated to disprove to the best of its ability. It was a charge which Aramco could disprove only by the testimony of the persons involved. Aramco had a duty to the members of its medical staff to clear their reputations from such a grave accusation. The resolution of this issue as well as all other issues rested solely and completely on the credibility of the witnesses.

Aramco also maintained that Farmer had committed a number of other acts which in themselves were sufficient grounds for his discharge. These acts included the slapping of a patient which was testified to by Nurse Neal (R I-444) and denied by Farmer (R I-1266); the conducting of an operation without proper surgical preparation which was testified to by Nurse Neal (R II-246) and numerous other acts such as removing a suture from a patient's eye without general anesthesia (See R I-140 *et seq.*).

D. The Opinion Below.

On the basis of the foregoing facts, the Court of Appeals, sitting *in banc*, reversed and remanded Judge Weinfeld's determination of allowable costs by a 5-4 decision (T 66; 324 F. 2d 359). It held "the 100-mile rule inapplicable as a restraint upon the exercise of judicial discretion in the assessment of transportation costs for witnesses brought to trial" (T 69; 324 F. 2d at 362), that "Judge Weinfeld should have deferred to Judge Palmieri with respect to those costs incurred in the first trial" (T 73; 324 F. 2d at 364), and that a judgment solely for costs is appealable (T 67, 68; 324 F. 2d at 361).

With regard to travel expenses of witnesses, Chief Judge Lumbard, speaking for the court, concluded that "28 U. S. C. §1821, as amended in 1949, provides clear authorization for the taxation of the actual expenses of travel for witnesses who come from afar" (T 69; 324 F. 2d at 362), that authorities based on the law prior to 1949 were not controlling (*ibid.*), that the subpoena power had "nothing to do with . . . how to allocate the cost" of a witness' appearance at trial (T 70; 324 F. 2d at 363), and that a case-by-case approach is more likely to protect impecunious litigants than a 100-mile limitation (T 71; 324 F. 2d at 363). Further, he found it was absolutely necessary for Aramco to have produced its witnesses on trial, stating:

> "The witnesses whose travel expenses are in dispute gave evidence relating to the conflicting accounts of the plaintiff's discharge. There is no question that these witnesses had information which was essential to disprove the plaintiff's claims and establish the defense. Judge Weinfeld determined, however, that in view of the heavy expense of producing them in court the defendant should have relied on written testimony taken in advance of trial or, at least, should itself bear the cost of the witnesses' appearance at trial. We cannot agree.
>
> "It is difficult to imagine a more serious charge against an employer than that he suppressed evidence that employees ran the risk of contracting a serious disease. In such circumstances, the defendant could not possibly have been expected to adopt less than the most effective means of disproving the plaintiff's charges." (T 72, 73; 324 F. 2d at 364).

Despite this ruling that Aramco's witnesses were absolutely material and necessary, and holding that Judge Palmieri correctly allowed witnesses' actual travel expenses

on the first trial, the majority upheld Judge Weinfeld in limiting travel costs on the second trial to 8¢ per mile for 100 miles to and from the place of trial. Chief Judge Lumbard stated:

> "• • • We do not hold that the full measure of travel expenses *must* be taxed against the unsuccessful party in each and every cause; we merely affirm the *power* of a federal district judge to exercise his discretion in the allocation of such costs. In exercising that discretion, the trial judge may well take account of the relative financial resources of the parties and the ability of the unsuccessful litigant to bear the costs of the litigation, where the action has been prosecuted in all good faith. It is only under such a rule that the impecunious litigant may be assured of his right to present effectively his case to judge and jury" (T 71; 324 F. 2d at 363).

By this statement the Court of Appeals apparently affirmed that if Judge Weinfeld limited Aramco's costs, as appears from Judge Weinfeld's opinion, largely on the basis that Aramco was a "rich litigant," this did not constitute an abuse of discretion (T 53, *et seq.*; 31 F. R. D. 191).

While the majority held that the discretion of Judge Palmieri as to the costs on the first trial should have been respected by Judge Weinfeld, they disallowed the costs awarded by Judge Palmieri for Swanson and Page who were transported from and to Saudi Arabia on Aramco's planes in seats that would otherwise have been vacant (T 73; 324 F. 2d at 364). These planes were owned, maintained and operated by Aramco at substantial expense. Aramco submitted a detailed and uncontroverted affidavit to Judge Palmieri showing the extent of this expense and accounting for the incremental costs allocated by Aramco for flying Swanson and Page (T 26, 27). The charges were

substantially less than the lowest first-class air fare available (T 26).

Circuit Judge Clark in his dissent in referring to the disallowance of Swanson and Page's travel expenses, stated:

> "* * * Except on the theory that two wrongs make a right, this cannot be justified, for it is settled on the authorities that costs for witnesses legally due are taxable, whether they have been paid to the witness or not. The taxing authority cannot be expected to go into the issue whether the witness may not have appeared voluntarily, making no claim for fees." (T 82; 324 F. 2d at 369).

Summary of Aramco's Argument.

1. *Total travel expenses of material and necessary witnesses should be taxed against the unsuccessful party regardless of the distances the witnesses travelled to and from the place of trial.*

Federal courts are in conflict, and there is a general uncertainty regarding the taxability of travel expenses for witnesses residing more than 100 miles from the place of trial. It is therefore essential that an affirmative rule be adopted for the taxation of such travel expenses, not just that a 100-mile limitation be rejected. It therefore is submitted that the Court should take this opportunity to establish that total travel expenses of material and necessary witnesses must be taxed.

Adoption of this rule would bring the taxation of travel expenses under 28 U. S. C. §1920 in line with the taxation of other expenses under 28 U. S. C. §1920, would be in accord with better reasoned decisions, and would fulfill the practical need of bench and bar for a just, simple and workable rule.

2. No 100-mile limitation on the allowable amount of taxable travel expenses should be applied.

A. The applicable statutes and a substantial body of well reasoned cases support the rejection of a 100-mile limitation on taxable travel expenses.

Federal Rule of Civil Procedure 54(d), together with 28 U. S. C. §1920(3), provides specific authority for allowing taxation of travel expenses of necessary witnesses. There is no indication in either 28 U. S. C. §1920(3) or Federal Rule of Civil Procedure 45(e)(1) that the right to tax travel expenses is limited to the scope of the subpoena power.

The 1949 amendment of 28 U. S. C. 1821, providing witness fees for witnesses from abroad, is specific authority for rejecting a 100-mile limitation on the taxation of such expenses. Cases applying a 100-mile limitation since 1949 have ignored this amendment and are inappropriate bases for continuing a 100-mile limitation.

B. The statutory rule which imposes a 100-mile limitation on the subpoena power is not a proper basis for limiting the amount of taxable travel expenses in cases where a necessary and material witness residing more than 100 miles from place of trial actually appears in person at the trial, regardless of the fact that his testimony by deposition would have been admissible.

A 100-mile limitation on travel expenses is not supported by the rationale of the 100-mile limitation on the subpoena power. The limitation on the subpoena power, set in 1793, was designed to protect witnesses from involuntary court attendance from distances of more than 100 miles. It should never have been related to the taxation of travel expenses of witnesses; and if it ever could have served usefully as any guide whatsoever to a federal

trial court with respect to the taxation of travel expenses, it has now become entirely inappropriate even for that purpose in the age of modern business dealings and jet travel.

The right to use depositions of witnesses residing outside the district and more than 100 miles from the place of trial is intended solely to protect parties from the inability to subpoena witnesses and should not be relied upon as a justification for penalizing parties by a denial of travel expenses where witnesses appear to testify. Rather, the fact that federal courts may tax the substantial costs of taking depositions furnishes authority for taxing the travel expenses of witnesses who, attending court without subpoena, make the taking of depositions unnecessary and contribute to and facilitate the determination of questions of fact at trial.

C. Policy considerations require the rejection of a 100-mile limitation on taxable travel expenses.

A 100-mile limitation on travel expenses seems completely inconsistent and unjustifiable in the absence of any such limitation in the language of 28 U. S. C. §1920 and in view of the fact that substantial necessary expenses, other than travel expenses, have been taxed under 28 U. S. C. §1920 without any artificial limitation.

A 100-mile limitation results, in many cases, in an effective denial of justice to poor litigants.

Rejection of a 100-mile limitation does not represent an approach to the English system of costs, but an affirmation of the rule first established in the United States by a series of well reasoned cases.

A 100-mile limitation, based on the subpoena power, is unrealistic and arbitrary in that it applies whether or not a witness attends under subpoena, and is arbitrary in that it

achieves results which in many instances depend more on the direction than the distance which a witness travels to the place of trial.

3. *Total travel expenses of defendant's material and necessary witnesses should be taxed as costs against the unsuccessful plaintiff where plaintiff or his witnesses testified falsely or where defendant's witnesses had to be transported from distant places to rebut testimony plaintiff or his witnesses changed on trial.*

The right to use depositions does not justify a limitation of travel expenses where, as in this action, the witnesses are either mentioned for the first time on trial or are necessary to rebut changes and threatened changes of testimony regarding sharp questions of fact.

Disregarding a 100-mile limitation under the circumstances of the instant action will not result in a denial of access to courts but will only discourage parties from basing their cases on falsehoods. Penalizing parties for falsehoods by taxing travel expenses against them finds support in Federal Rule of Civil Procedure 37(c), which allows the taxation of all costs including attorneys' fees against the party who unjustifiably refuses to admit the truth of a fact.

4. *It is an abuse of discretion for a federal district judge to limit the amount of witnesses' travel expenses taxed as costs against an unsuccessful party on the basis of the relative financial resources of the parties.*

Denying costs to the richer of two parties merely because of his wealth is in opposition to the concept of equal justice under law. The settlement process also

will be impeded and "strike" suits encouraged if costs are awarded on the basis of the relative financial resources of parties.

The necessary determination of the relative financial resources of litigants would entail the utilization of an unjustifiable amount of court time.

Neither case law nor Federal Rule of Civil Procedure 54(d) and 28 U. S. C. §1920 supports a holding that the fact that a prevailing defendant is sued by a less wealthy plaintiff is proper ground to limit the defendant's costs. Heretofore, courts have only limited a prevailing party's costs for improper conduct.

5. *It is an abuse of discretion for the judge on the second trial to review and reassess the costs taxed by the judge on the first trial, where there have been two trials of an action before different judges of a federal district court and neither trial resulted in a judgment for plaintiff.*

As emphasized by Chief Judge Lumbard, the judge who presides at the first trial of an action has the greater opportunity to assess the necessity of particular costs incurred on the first trial than does the judge presiding at the second trial.

A rule that a judge at the second trial must not interfere with the costs awarded at the first trial avoids the problems presented when one district judge is asked to pass upon the exercise of discretion by another district judge.

6. *The Court of Appeals was in error when it failed to affirm the award of costs made by Judge Palmieri at the first trial on the basis of the incremental costs to Aramco of transporting two necessary and material witnesses to and from the place of trial on its own planes.*

It is improper cost accounting and indeed the negation of proper cost allocation to conclude that since Aramco incurred no immediate out-of-pocket expenses in transporting two witnesses from and to Saudi Arabia on Aramco planes it cost Aramco nothing to provide this transportation.

28 U. S. C. §1821 provides direct authority for allowing Aramco the lowest cost first class commercial air fare for witnesses transported from and to Saudi Arabia on Aramco's own planes. However, Aramco only seeks a lesser amount, the actual cost of this transportation on Aramco planes as computed in accordance with accepted accounting standards.

Denying costs to parties who employ their own facilities in transporting witnesses will encourage wrongly the utilization of more expensive commercial facilities.

7. *The decision of the Court of Appeals which held that a judgment solely for costs is properly appealable should be held to be correct inasmuch as the issues raised require the resolution of basic questions of law.*

The overwhelming weight of authority supports the appealability of a judgment for costs. Certainly such a judgment should be appealable where, as here, fundamental questions are raised regarding the construction of statutes and positive rules of law.

Newton v. *Consolidated Gas Co.*, 265 U. S. 78 (1924), relied on by Farmer in his petition for certiorari, allowed an appeal from a judgment for costs in a situation similar to the instant action and supports the appealability of Judge Weinfeld's decision.

ARGUMENT.

I. Total travel expenses of material and necessary witnesses should be taxed against the unsuccessful party regardless of the distances the witnesses travelled to and from the place of trial.

The state of the law with respect to the allowance to the successful party of the travel expenses of witnesses residing outside the federal district in which the case is heard, and outside a radius of one hundred miles from the place of trial, is at best imprecise. Some federal courts have allowed the total travel expenses of such witnesses to the successful party;[5] others have allowed travel expenses only to a maximum distance of one hundred miles from the place of trial;[6] still others have allowed the expenses of travel within the court district which may be more than 100 miles, or actual mileage travelled in and out of the district up to 100 miles, whichever is greater.[7] Some federal courts have related the matter of taxation of travel expenses of such witnesses with the subpoena power;[8] others have related the taxation of such expenses with the right to take depositions of witnesses residing beyond the subpoena power.[9] Some federal courts have allowed such travel expenses because of the implications of the 1949 amendment to 28 U. S. C. §1821, allowing

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[5] *Nuzzo* v. *Rederi A/S Wallenco, Stockholm, Sweden*, 325 F. 2d 994 (C. A., 2nd Cir. 1963).

[6] *Friedman* v. *Washburn Co.*, 155 F. 2d 959, 963 (C. A., 7th Cir. 1946).

[7] *Kemart Corp.* v. *Printing Arts Research Lab.*, 232 F. 2d 897, 904 (C. A., 9th Cir. 1956).

[8] *Id.* at 903.

[9] *Vincennes Steel Corporation* v. *Miller*, 94 F. 2d 347, 349, 350 (C. A., 5th Cir. 1938).

witnesses travel expenses from and to any points beyond the continental limits of the United States;[10] some federal judges have preferred to follow an analogy to the maritime rule whereby taxation of travel expenses in maritime cases is expressly limited by statutory rule to a hundred miles radius from the place of trial.[11]

As of the present, no federal court litigant, plaintiff or defendant, can predict with any degree of certainty whether or not or in what portion he will be awarded travel expenses for witnesses residing beyond 100 miles from the place of trial in the event of success in litigation. And no federal court has any real blueprint to make consistency possible among the various federal courts and to enable the time of the courts to be saved for matters of substance.

The law in this respect, it is respectfully submitted, is in a relatively undeveloped and deplorable state. The matter is all the more compelling now, in the latter half of the twentieth century, when the increased geographic scope of trade and commerce, and the distant residences of parties dealing one with another, the probable need of bringing witnesses from a distance, and the advent of jet travel, make it commonplace in the proper administration of justice to require evidence and testimony of witnesses from far distant states and countries.

In the broad sense this is the problem raised in this case, in its proper setting and background. This portion of the brief is therefore directed to commending for the Court's consideration the adoption of a consistent rule which will resolve the general uncertainty in taxation of travel costs, and which will not only dispose of this case in what we deem a proper manner, but will

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[10] *Bank of America* v. *Loew's International Corporation*, 163 F. Supp. 924, 930 (S. D. N. Y. 1958).

[11] *Farmer* v. *Arabian American Oil Company*, 324 F. 2d at 365, 367 (dissenting opinion of Circuit Judge Smith).

also serve as a simple instruction to federal courts and to the federal bar in the guidance of its clients. It is respectfully submitted that the Court should take this opportunity to establish that total expenses of travel for necessary and material witnesses from anywhere to and from the place of trial must be taxed against the unsuccessful party.

Adoption of this rule would bring the taxation of travel expenses under 28 U. S. C. §1920 in line with the taxation of other expenses under 28 U. S. C. §1920. 28 U. S. C. §1920 provides:

> "A judge or clerk of any court of the United States may tax as costs the following:
>
> (1) Fees of the clerk and marshal;
>
> (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
>
> (3) *Fees and disbursements for* printing and *witnesses;*
>
> (4) Fees for exemplification and copies of papers necessarily obtained for use in the case;
>
> (5) Docket fees under section 1923 of this title." (emphasis added).

All necessary and material expenses which fit within any of the categories of the various paragraphs of 28 U. S. C. §1920 have been consistently held to be fully taxable, except for the confusion which prevails as to the travel expenses of necessary and material witnesses under 28 U. S. C. §1920(3). See, e.g., *U. S.* v. *Kolesar*, 313 F. 2d 835 (C. A., 5th Cir. 1963, Brown, J.) (copies of depositions); *Moore-McCormack Lines, Inc.* v. *Richardson*, 295 F. 2d 583, 597, 598 (C. A., 2nd Cir. 1961, Lumbard, J.), *cert. den.* 368 U. S. 989, *cert. den.* 370 U. S. 937,

rehearing den. 370 U. S. 965 (1962) (trial transcript); *Pickett* v. *Aglinsky,* 110 F. 2d 628, 632 (C. A., 4th Cir. 1940, Parker, J.) (printing trial record in appendix on appeal); *Freedman* v. *Philadelphia Terminals Auction Company,* 198 F. Supp. 429, 430 (E. D. Penn. 1961, Van Dusen, J.) (reporter's fees for pretrial hearings and arguments).

Thus, in *U. S.* v. *Kolesar, supra,* it was established that the costs of a copy of a deposition, obtained by counsel for his own use in the trial of the case, were taxable against an unsuccessful litigant. The Court of Appeals (Brown, J.) reached this decision on the basis of the necessity of such depositions, stating:

> "What this means, of course, is that someone must determine in the particular context of a specific case just what depositions have been necessary. No one is better equipped for that than the trial Judge. Thus while we reject Judge Hincks' thesis that forbids the cost of a copy of any deposition altogether as a flat inexorable prohibition, we do not by reflex action establish a rule of like rigidity in the opposite direction. On the contrary, we keep it as flexible as the concept of necessity requires. The trial Judge must determine whether all or any part of a copy of any or all of the depositions was 'necessarily obtained for use in the case.' In that evaluation, great latitude and discretion must be accorded the Judge. Reversal will require an abuse of discretion." (313 F. 2d at 840).

There is no reason why a similar rule based on necessity should not apply to the taxation of travel expenses. Subparagraph (3) of 28 U. S. C. §1920, providing for the taxation of "fees and disbursements for * * * witnesses", most surely has the same statutory import and authority as the

other subparagraphs of this same section. If, therefore, the courts uniformly hold that all expenses deemed necessary under these other subparagraphs are clearly and fully taxable as costs, the logic is unmistakably, and it is submitted irrebuttal, that the same ruling should be made with respect to "fees and disbursements for * * * witnesses."

The necessity of having witnesses at a trial is certainly as great as the necessity of obtaining copies of depositions, of providing transcripts of pre-trial hearings and daily trial proceedings and of printing sections of the trial record in appendices in briefs on appeal. Indeed, in cases such as this, live testimony is essential and depositions would not serve as an adequate substitute.

In this action Chief Judge Lumbard emphasized:

> "The witnesses whose travel expenses are in dispute gave evidence relating to the conflicting accounts of the plaintiff's discharge. There is no question that these witnesses had information which was essential to disprove the plaintiff's claims and establish the defense." (T 72; 324 F. 2d at 364).

He significantly stated:

> "It is difficult to imagine a more serious charge against an employer than that he suppressed evidence that employees ran the risk of contracting a serious disease. In such circumstances, the defendant could not possibly have been expected to adopt less than the most effective means of disproving the plaintiff's charges. We have had occasion in the past to note the importance of 'live' witnesses in a trial before a jury. See *Arnstein* v. *Porter* 154 F. 2d 464, 469-470 (1946) * * *." (T 73; 324 F. 2d at 364).

And on appeal from the judgment dismissing Farmer's action for his failure to furnish an undertaking for costs Circuit Judge Clark noted:

> "* * * Indisputably the parties are sharply at odds here * * *." (*Farmer* v. *Arabian American Oil Company*, 285 F. 2d 720, 721 (C. A., 2nd Cir. 1960)).

That the same test, the test of materiality and necessity, is required for the taxing of expenses as costs under each of the five subparagraphs of 28 U. S. C. §1920 is affirmatively implied in 28 U. S. C. §1924 which provides:

> "Before any bill of costs is taxed, the party claiming any item of cost or disbursement shall attach thereto an affidavit, made by himself or by his duly authorized attorney or agent having knowledge of the facts, that such item is correct and has been necessarily incurred in the case and that the services for which fees have been charged were actually and necessarily performed."

There is nothing in 28 U. S. C. §1924 which indicates that travel expenses can be limited on any basis other than that they are unnecessary. Indeed, even where federal courts have applied an artificial 100-mile limitation (discussed *infra*, page 32) necessity has been the sole criterion in awarding travel expenses. See, *e.g.*, *Spiritwood Grain Co.* v. *Northern Pac. Ry. Co.*, 179 F. 2d 338, 344 (C. A., 8th Cir. 1950); *Commerce Oil Refining Corporation* v. *Miner*, 198 F. Supp. 895, 897 (D. R. I. 1961); *Bowman* v. *West Disinfecting Company*, 25 F. R. D. 280, 284 (E. D. N. Y. 1960); *Kenyon* v. *Automatic Instrument Co.*, 10 F. R. D. 248, 250, 251 (W. D. Mich. 1950).

The adoption of a ruling requiring taxation of total travel expenses of material and necessary witnesses is not without precedent. This ruling has been reached by courts which have given serious consideration to the general uncertainty existing on the question of travel from beyond 100 miles to the place of trial.

Thus, in *Bank of America* v. *Loew's International Corporation*, 163 F. Supp. 924, 929 (S. D. N. Y. 1958), the late District Judge Dawson found the testimony of a witness to be necessary and therefore taxed the witness' round trip airfare from England, stating

> "Such [100-mile] limitation has been frequently applied to taxation of costs, but seems to have no basis in either the statute or in the realities of modern trials. • • • The real issue is whether • • • [a witness'] testimony was necessary." (Id. at 929).

Similarly in *Nuzzo* v. *Rederi A/S Wallenco, Stockholm, Sweden*, 325 F. 2d 994, 995 (C. A., 2nd Cir. 1963), a $150,000 action for negligence and unseaworthiness, it was held *per curiam* that the necessity of having oral testimony from "the one man best equipped to inform the court of • • • [defendant's] version of the facts on which liability hinged" made it an abuse of discretion to deny the defendant the total travel expenses of bringing a witness from Sweden to rebut the testimony of the plaintiff and his witnesses concerning these facts. The Court of Appeals for the Second Circuit (Moore, Friendly and Kaufman, C. J. J.) cited *Farmer* v. *Arabian American Oil Company*, 324 F. 2d 359 (C. A., 2nd Cir. 1963) and stated:

> "• • • There is no need for us to expatiate on the relative ineffectiveness of depositions or interrogatories in controverting eye-witness testimony. Although this is particularly true before a jury, which Nuzzo had demanded, a judge also is far more likely to be impressed by a 'live' witness than by reading or listening to the droning of a deposition; furthermore his observation of the witness' demeanor has an importance as to credibility that we have often stressed. See Dyer *v.* MacDougall, 201 F. 2d 265, 268-69 (2 Cir. 1952) and cases cited • • •." (325 F. 2d at 995, 996).

See also *Bennett Chemical Co.* v. *Atlantic Commodities, Ltd.*, 24 F. R. D. 200 (S. D. N. Y. 1959, Dawson, J.); *Moresco* v. *Flota Mercante Grancolombiana, S. A.*, 167 F. Supp. 845 (E. D. N. Y. 1958, Byers, J.); *Knox* v. *Anderson*, 163 F. Supp. 822 (D. Hawaii 1958, McLaughlin, J.).

Even if statute and better reasoned decisions did not commend the taxation of total travel expenses for necessary and material witnesses, practical considerations do so. The difficulties Circuit Judge Clark foresaw for district court clerks faced with applying varying rules in taxing travel costs[12] are easily avoided if necessity is the only criterion for taxing travel costs. This standard has long been successfully applied in awarding other costs under 28 U. S. C. §1920.

Further, the procedure for taxing travel expenses will be greatly simplified, to the benefit of parties and overburdened federal courts if necessity is the only criterion. Indeed, the complex course of litigation regarding costs in the instant action amply illustrates the burdens federal courts and parties may bear in the absence of certainty as to the method of taxing travel expenses.

It is therefore respectfully submitted that the interests of justice, bench and bar require that an affirmative rule be adopted, a rule that total travel expenses of material and necessary witnesses must be taxed against the unsuccessful party.

II. No 100-mile limitation on the allowable amount of taxable travel expenses should be applied.

The submission in Point I above is directed to the juridical and practical need to clear away the confusion, which presently exists in the various federal district and

[12] T 81; 324 F. 2d at 369.

circuit courts with regard to travel expenses, by this Court adopting an affirmative ruling that total travel expenses of necessary and material witnesses must be taxed. This section is addressed to the Court of Appeals' rejection of a 100 mile limitation in the taxation of travel expenses of witnesses.

A. The applicable statutes and a substantial body of well reasoned cases support the rejection of a 100-mile limitation on taxable travel expenses.

Federal Rule of Civil Procedure 54(d) provides in part that "costs shall be allowed as of course to the prevailing party unless the court otherwise directs". 28 U. S. C. §1920(3) provides in part:

> "A judge or clerk of any court of the United States may tax as costs the following:
>
> * * * * * *
>
> (3) Fees and disbursements for * * * witnesses * * *"

Despite the broad language of Rule 54 and 28 U. S. C. §1920(3) it was the position of the circuit judges dissenting in this action that the right of federal trial judges to tax travel expenses of necessary and material witnesses is limited by the scope of the subpoena power (or the greater of either the distance travelled within the district or the distance travelled in and out of the district up to 100 miles). Neither statutory language nor legislative history could be cited by the dissenters in support of their position.

As stated by Chief Judge Lumbard:

> "There is not a shadow of a suggestion, * * * in 28 U. S. C. §1920(3) * * *, that the court's power to issue a subpoena has anything whatsoever to do with

what constitutes a recoverable disbursement for a witness." (T 69; 324 F. 2d at 362).

Nor does Federal Rule of Civil Procedure 45(e)(1) or its statutory predecessors,[13] which limit the subpoena power to the court district or 100 miles from the place of trial, "purport to affect the liability of parties for costs". *Vincennes Steel Corp.* v. *Miller*, 94 F. 2d 347, 349 (C. A., 5th Cir. 1938, Holmes, J.); *United States* v. *Sanborn*, 28 Fed. 299, 303 (C. C. D. Mass. 1886; Gray, J.), *rev'd on other grounds*, 135 U. S. 271 (1890); *Prouty* v. *Draper*, 20 Fed. Cas. 13 (No. 11,447) (C. C. D. Mass., Story, J.), *aff'd* 41 U. S. 336 (1842).

To the contrary, the fact that Federal Rule of Civil Procedure 45(e)(1) was adopted subsequent to Admiralty Rule 47, which imposed a 100-mile limitation on taxable travel expenses in admiralty actions, indicates that Rule 45(e)(1) was not intended to create a similar limitation in civil actions; it seems unlikely that the drafstmen would have left the matter to implication. 64 Col. L. Rev. 955, 960 (1964).

The question to be determined therefore is whether it is proper to imply from the *mere existence* of the 100-mile limitation on the scope of the subpoena power that the clear statutory discretion provided by Rule 54(d) and 28 U. S. C. §1920(3) with regard to travel expenses is similarly limited.[14] 64 Col. L. Rev. 955, 957 (1964).

While it is submitted there has never been any merit in implying a 100-mile limitation on taxable travel expenses

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[13] Act of March 2, 1793, c. 22, §6 (1 St. 335); re-enacted in 1875 as Revised Statutes §876 (former 28 U. S. C. A. §654, 42 Stat. 848).

[14] Circuit Judge Smith stated in his dissent that the 100-mile limitation on taxable travel expenses had been "imported" by courts from the territorial limitation on subpoenas (T 75; 324 F. 2d at 366).

from the similar limitation on the subpoena power,[15] there is certainly no merit since the 1949 amendment of 28 U. S. C. §1821 (63 Stat. 65). As Chief Judge Lumbard points out:

> "• • • 28 U. S. C. §1821 as amended in 1949 provides clear authorization for the taxation of the actual expenses of travel for witnesses who come from afar". (T 69; 324 F. 2d at 362).

The 1949 amendment of 28 U. S. C. §1821 provides in part that:

> "[W]itnesses who are required to travel between the Territories, possessions, or to and from the Continental United States, shall be entitled to the actual expenses of travel at the lowest first-class rate available at the time of reservation for passage, by means of transportation employed".

The sparse legislative history of this amendment indicates that, according to the Department of Justice,[16] the purpose of the amendment was to relieve the financial burden on witnesses traveling from overseas. 64 Col. L. Rev. 955, 957 (1964).

In applying a 100-mile limitation before the 1949 amendment of 28 U. S. C. §1821, federal courts taxed as travel expenses the amount of witness fees provided by 28 U. S. C. §1821 (five cents per mile; e. g., *Vincennes Steel Corporation* v. *Miller, supra*). There is, therefore, every reason to believe that the 1949 amendment to 28 U. S. C. §1821 was also intended by Congress to form a basis for taxing costs; and as this amendment changed witness fees to allow first class air fare for overseas distances obviously greater than 100 miles, it is apparent that amended 28 U. S. C.

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[15] This point is discussed further, page 38 *et seq., infra.*

[16] S. Rep. No. 187, 81st Cong., 1st Sess., p. 2 (1949); reprinted in 1949 U. S. Code Cong. Serv. pp. 1231, 1233.

§1821 directly supports rejection of a 100-mile limitation on travel expenses. Thus in 64 Col. L. Rev. 955, 961 (1964) it is said:

> "If its [Congress'] silence on the 100-mile rule constituted an implicit adoption of the judicial construction of Section 1821 and Rule 54(d) [a 100-mile limitation on taxable travel expenses], why was there such concern about the costs of overseas travel?"

In other cases since the 1949 amendment of 28 U. S. C. §1821 it also has been held that a 100-mile limitation is no longer applicable. *Nuzzo* v. *Rederi A/S Wallenco, Stockholm, Sweden, supra.* (round-trip between New York and Sweden); *Bennett Chemical Co.* v. *Atlantic Commodities, Ltd., supra.* (two witnesses from more than 100 miles); *Maresco* v. *Flota Mercante Grancolombiana, S. A., supra.* (one-way to New York from Portland, Ore. and Bogota, Colombia); *Knox* v. *Anderson, supra.* (round-trip between Los Angeles and Honolulu); *Bank of America* v. *Loew's International Corporation, supra.* (round-trip between England and New York). Thus, Judge Dawson concluded in *Bank of America* v. *Loew's International Corporation*, 163 F. Supp. at 930:

> "• • • [I]t would seem that this [100-mile] limitation is no longer realistic and that to impose such limitation in actions such as the present one would be a complete negation of the clear provisions of the statute [28 U. S. C. §1821, as amended in 1949]."

While there have been decisions since the 1949 amendment of 28 U. S. C. §1821 in which a 100-mile limitation for taxable witness fees has been applied[17], Chief Judge Lumbard made it clear that:

[17] See cases cited by Chief Judge Lumbard in *Farmer* v. *Arabian American Oil Company*, 324 F. 2d 359, 362 (C. A., 2nd Cir. 1963).

> "The vast majority of the more recent cases which approve the rule do no more than cite other cases, without considering the reasons which might lend support to it or weigh against it. Those cases decided subsequent to the 1949 legislation give it little or no attention." (T 69; 324 F. 2d at 362).

Nor, it is submitted, did the dissenters in the instant action adequately analyze the effect of the 1949 amendment to 28 U. S. C. §1821. Circuit Judge Smith conceded that the Assistant to the Attorney General, who pointed out to Congress that the purpose of the 1949 amendment to 28 U. S. C. §1821 was to relieve the financial burden of witnesses traveling from overseas[18], was undoubtedly familiar with a pre-existing 100-mile limitation applied by some courts (T 78; 324 F. 2d at 367). See discussion page 35 *supra*.

Furthermore, it would seem that Circuit Judge Smith ignored the normal canons of statutory construction in arguing that it is "anomalous" to maintain that "the Congress which in 1948 confirmed the power of the Supreme Court over costs in admiralty in the face of existing [Admiralty] Rule 47 applying the 100-mile travel cost limit, indirectly rejected * * * [Admiralty Rule 47] a year later by a statute not limited to civil cases (T 78; 324 F. 2d at 367).

No "anomaly" or "rejection" of Admiralty Rule 47 should be found for a normal presumption of statutory construction, that statutes are not repealed by implication,[19] requires that 28 U. S. C. §1821 be construed as not repealing Admiralty Rule 47 (as ratified by 28 U. S. C. §1925), but nothing requires that 28 U. S. C. §1821 be construed as continuing a non-statutory 100-mile limitation in civil cases.[20]

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[18] S. Rep. No. 187, 81st Cong. 1st Sess., p. 2 (1949); reprinted in 1949 U. S. Cong. Serv. pp. 1231, 1233.

[19] 1 Sutherland, *Statutory Construction* §2014 (3rd Ed. 1943) and cases therein listed.

[20] It is to be noted that Admiralty Rule 47 has been disapproved by the Advisory Committee on Admiralty Rules in its recent revision of the rules. See Amendments to Effect Unification of

Circuit Judge Smith also argues that taxing witnesses' travel expenses beyond the 100-mile limit of the subpoena power "creates a different rule for costs in civil cases from that in admiralty." T 74; 324 F. 2d at 365. But as pointed out in 64 Col. L. Rev. 955, 960 (1964):

> "***Judge Smith's argument that the majority was creating different rules for admiralty and civil cases is mistaken, for the rules already were different. Admiralty Rule 47 limits travel costs to 100 miles for *any* witness, while the civil rule Judge Smith favors allows costs for the greater of mileage '*within* the district *or* actual mileage . . . in and out of the district up to 100 miles.'* * *"

Further there is valid reason for the existence of a different rule for civil litigation from that in admiralty in that:

> "In admiralty, litigants have traditionally relied heavily upon depositions, no doubt because of the absence of juries and the common dispersion of potential witnesses throughout the world." (64 Col. L. Rev. at 960).

B. The statutory rule which imposes a 100-mile limitation on the subpoena power is not a proper basis for limiting the amount of taxable travel expenses in cases where a necessary and material witness residing more than 100 miles from place of trial actually appears in person at the trial, regardless of the fact that his testimony by deposition would have been admissible.

The justification of the subpoena power is the recognition that oral testimony is needed on trial to achieve a just verdict. As stated by Mr. Justice Gray in *United States* v. *Sanborn*, 28 Fed. at 302:

Civil and Admiralty Procedure, Preliminary Draft of Proposed Amendments to Rules of Civil Procedure for the United States District Courts, Part I (March 1964).

> "The only object of a subpoena is to compel the witness to attend. • • • The examination of the witness in the presence of the tribunal that is to pass upon his testimony is often quite as important to the party against whom he is called as to the party calling him; and the statutes of the United States from the beginning have declared that the mode of proof in the trial of actions at common law shall be by oral testimony, and examination of witnesses in open court, except as otherwise especially provided. Act of September 24, 1789, C. 20 §30 (1 St. 88; Rev. St. §861.)."

But while it was recognized that parties should be allowed to compel witnesses to testify on trial it was also recognized that witnesses should not be compelled to travel unreasonable distances from home and family. Cf. *United States* v. *Sanborn, supra* at 303. In 1793 it was considered unreasonable to require witnesses to travel more than 100 miles to the place of trial when such witnesses resided outside the judicial district where the trial was held. Thus in the Act of March 2, 1793, c. 22, §6 (1 St. 335), it was provided that subpoenas for witnesses in civil actions could run from one district into another only when the witnesses did not live more than 100 miles from the place of trial.

This 100 mile limitation on the subpoena power has remained in effect though it is less difficult today to travel many thousand miles than to travel 100 miles in 1793. The statute of March 2, 1793 was re-enacted in 1875 (Revised Statutes §876, former 28 U. S. C. §654, 42 Stat. 848) and is the statutory predecessor of Federal Rule of Civil Procedure 45(e)(1). *United States* v. *Sanborn*, 28 Fed. at 303; 64 Col. L. Rev. 955, 957 (1964). Basically, therefore, the argument that taxable travel expenses should be limited by the scope of the subpoena power asks this Court to rest its decision on travel expenses, in this age of jet travel,

on the difficulty of traveling more than 100 miles to a place of trial in 1793! Chief Judge Lumbard recognized the anomaly of this situation, stating:

> "• • • As this case well illustrates, a 100-mile limitation is an anachronism in a day when the facility of world-wide travel and the development of international business make the attendance at trial of witnesses from far off places almost a matter of course" (T 70, 71; 324 F. 2d at 363).

Furthermore, it is clear that, as Chief Judge Lumbard held:

> "• • • The fact that a subpoena does not issue because the witness is outside the reach of the court has nothing to do with the problem of how to allocate the cost of his appearance at the trial" (T 70; 324 F. 2d at 363).

An analysis of the rationale for the 100-mile limitation on the subpoena power demonstrates that there is nothing in this limitation which makes it a valid analogy for imposing a similar limitation on travel expenses. Statutes fixing the 100-mile limitation on the subpoena power "do not purport to affect the liability of the parties for costs" (*Vincennes Steel Corporation* v. *Miller*, 94 F. 2d at 349) but were designed solely to protect witnesses against involuntary attendance at federal courts far from their homes. *United States* v. *Sanborn*, 28 Fed. at 303. This protection is unnecessary, and the reason for the 100-mile limitation on the subpoena power vanishes where a witness travels to the place of trial from afar. Thus in imposing a 100-mile limitation on taxable travel expenses of witnesses who come from afar on the basis of the 100-mile limitation on the subpoena power, courts are relying on the 100-mile limitation on the subpoena power in a situation where this limita-

tion has, in effect, been waived by the attendance without subpoena on trial of the persons it was designed to protect! Indeed, the very existence of the subpoena power as a recognition of the need for oral testimony on trial suggests that parties should be rewarded for their efforts in persuading distant witnesses to testify, not penalized by a denial of travel expenses.

Similarly, the rationale for allowing the use of depositions of witnesses residing more than 100 miles from the place of trial does not support the apparent position of Circuit Judge Clark[21] that depositions are to be required to be used in place of live testimony.

The right of a party to use the deposition of a witness residing more than 100 miles from the place of trial (Federal Rule of Civil Procedure 26(d)(3)) is a necessary concomitant to the limitation of the scope of the subpoena power. It was intended solely "to provide a means by which the party may not wholly lose the benefit of * * * [the witness'] testimony, if he cannot, or will not, attend court." See *United States* v. *Sanborn*, 28 Fed. at 303. Thus, the right to use the deposition of a witness residing more than 100 miles from the place of trial in no way justifies a theory requiring that such a deposition be used in the stead of a live witness at the trial. Certainly a statute designed solely to protect parties from the unavailability of witnesses should not be read as a basis for denying parties the necessary protection and right of being able to call live witnesses to support a valid position, and, if successful upon the trial, to recover the travel expenses of such necessary witnesses.

Indeed, the fact depositions of witnesses who reside beyond the subpoena power of the federal court can be used as an alternative to their oral testimony in court furnishes

[21] T 82, 83; 324 F. 2d at 369, 370.

a sound precedent for allowing travel expenses of witnesses beyond a 100-mile limit. Federal judges are empowered to tax against the losing party the necessary expenses of taking the depositions of witnesses who are beyond the subpoena power of their courts. *Ryan* v. *Arabian American Oil Co.*, 18 F. R. D. 206 (S. D. N. Y. 1955, Bondy, J.); *North Atlantic & Gulf Steamship Co.* v. *United States*, 16 F. R. Serv. 30b.41, case 2 (S. D. N. Y. 1951, Sugarman, J.); S. D. and E. D. New York Local Civil Rule 5(a); 4 Moore, Federal Practice, Par. 26.36 (2nd Ed. 1963). There logically can be no reason why federal judges should not be vested with a similar right to tax necessary travel expenses; especially as by producing a witness without subpoena on trial a party may be saving the expense of a deposition, while at the same time aiding the deliberation of the federal court and jury by producing oral testimony for which the deposition would have been a poor substitute.

The taxable cost of taking depositions may be far in excess of the travel expense of bringing the witness to the trial, as the taxable cost of taking the deposition may include not only the travel and other expenses of counsel in going to the place of deposition, but also the cost of stenographic transcripts, and even attorneys' fees, to say nothing of the expenses of the losing party in the travel and other expenditures of his own counsel. E.g., *Bank of America* v. *Loew's International Corporation*, 163 F. Supp. at 929

The Court of Appeals for the Second Circuit reached a decision *per curiam* finding an abuse of discretion in denying a successful defendant the full cost of bringing a witness from Sweden, at least partially on the basis that:

> "* * * [T]he implicit assumption that no substantial expense is involved in obtaining testimony by depositions or interrogatories does not seem founded in

experience." (*Nuzzo* v. *Rederi A/S Wallenco, Stockholm, Sweden*, 325 F. 2d at 996).

Similarly in *Bank of America* v. *Loew's International Corporation, supra,* District Judge Dawson awarded a successful defendant the cost of bringing three witnesses from England on the basis that a like expense would have been entailed and would have been awarded as costs to the defendant had the deposition procedure been instead used. Judge Dawson stated (163 F. Supp. at 929, 930):

> "* * * [I]f, in the present situation, the testimony of the three witnesses in question had been taken by deposition, it is obvious that it would have been testimony which could only have been taken on an open commission with a right of cross-examination by the adverse party. Under those circumstances the Court would have required that the defendant pay the expenses of one of plaintiffs' attorneys to travel to Great Britain for the purpose of participating in the deposition, and could have taxed the expenses and fees of such attorney as costs. S. D. N. Y. Civil Rule 4 [now 5(a)]. See, also, Ryan v. Arabian Oil Co., *supra;* 4 Moore, Federal Practice, Pars. 30.14; 26.36. The expenses of an attorney for each side going to Great Britain for the purpose of taking the depositions would have been at least as great as those involved in bringing the witnesses to this country so that they might testify in person. It has been urged that to tax as costs the bringing of witnesses from far places might greatly increase the costs of litigation. However, the same objection could be made to taking the depositions of witnesses in far places. But one of the great advantages of the present Federal Rules of Civil Procedure is that it enables the parties to discover the facts no matter where they may be. The fact that such discovery may be expensive is not regarded as a reason for curtailing discovery, unless the expense is such that

> it bears no reasonable relationship to the evidence sought to be adduced.

And in 64 Col. L. Rev. 955, 961, 962 (1964) it is stated that:

> "Even when depositions would not be any less effective than live testimony, they may be difficult to obtain, especially when—as in the instant case—the deponent resides in a foreign country. While certain of these expenses may also be taxable in part, the practical problems might in fact result in greater expense than would be entailed by having him testify in person. An *ad hoc* approach would * * * permit evaluation of such considerations * * *."

C. Policy considerations require the rejection of a 100-mile limitation on taxable travel expenses.

Even if Federal Rule of Civil Procedure 54(d), 28 U. S. C. §1920(3) and 28 U. S. C. §1821, as amended in 1949, did not provide convincing authority for rejecting a 100-mile limitation on taxable travel expenses, ample basis exists for such rejection.

Chief Judge Lumbard adverts to the fact that:

> "There is no reason why a judge should be thought less capable of determining a proper allocation of the costs of witnesses' travel expenses than he is of allocating other expenses of trial, such as transcripts, which are committed without artificial limitation to the discretion of the trial judge." (T 71; 324 F. 2d at 363).

There also is no reason why federal judges who are deemed capable of taxing necessary expenses of travel from within 100 miles of the place of trial (e.g., *Spiritwood Grain Co.* v. *Northern Pac. Ry. Co.*, 179 F. 2d at 344) should not be deemed capable of taxing such expenses with regard to travel from beyond 100 miles from the place of trial.

Indeed, in the absence of any limitation on the taxation of substantial[22] necessary expenses other than travel expenses under 28 U. S. C. §1920, an artificial 100-mile limitation on travel expenses seems completely inconsistent and unjustifiable.

Contrary to Circuit Judge Smith's position (T 75, 324 F. 2d at 365), granting the right to tax necessary travel expenses will not deny parties of moderate means access to the federal courts. Federal judges have long been granted the right to tax necessary expenses other than travel expenses under 28 U. S. C. A. §1920 without any artificial limitation on this right, and there has been no indication that access to the federal courts has in any way been impeded.

Moreover, as Chief Judge Lumbard stated:

> "It has been suggested that the 100-mile rule serves a salutary purpose insofar as it erects some protection for the impecunious litigant who might otherwise hesitate to institute litigation in the fear that, if unsuccessful, he may bear the burden of transporting the defendant's witnesses. It seems plain, however, that any such solicitude for the rule is ill-founded. There may be cases in which the fair administration of justice requires that the losing party not be taxed to the full extent of the cost of producing witnesses for the other party. But it surely cannot be said that there will never be a case in which the losing party, in the interest of justice, should bear such costs. For example, had the positions in this case been reversed and Farmer been forced to produce witnesses from Saudi Arabia in

[22] See, e.g., *Farmer* v. *Arabian American Oil Co.*, 324 F. 2d 359 (C. A., 2nd Cir. 1963) (stenographic fees, $1,812.30); *Swan Carburetor Co.* v. *Chrysler Corp.*, 149 F. 2d 476 (C. A., 6th Cir. 1945) (charts and drawings, $3,179.80); *Commerce Oil Ref. Corp.* v. *Miner*, 198 F. Supp. 895 (D. R. I. 1961) (stenographic fees, $1,767.90).

> order to defend against unjust charges of Aramco, one could hardly assert the justice of requiring Farmer to pay the costs of producing his witnesses himself, or risk the failure of his defense. Indeed, adherence to a rigid limitation on the taxation of travel expenses is more likely to work to the detriment of litigants with meager financial resources than a rule which leaves the allocation of costs to be determined according to the circumstances of each case" (T 71; 324 F. 2d at 363).

To carry Chief Judge Lumbard's example further, it is apparent that a 100-mile limitation on taxable travel expenses can, in many cases, result in an effective denial of justice to the poor plaintiff or defendant. These individuals may be unable to bear the expense of transporting distant witnesses to trial where there is no possibility of recoupment of the expense, with the result that it may be impossible for them to bring actions or to successfully defend actions which depend upon the testimony of distant witnesses. On the other hand, if the possibility of recoupment existed the poor plaintiff or defendant might be more willing to bear or able to find the means to bear the initial expense of transporting his witnesses to place of trial.

The effect of a 100-mile limitation in denying justice to the poor, it is submitted, far outweighs any adverse effect on access to federal courts that the dissent contends will result from a rejection of a 100-mile limitation.

Circuit Judges Smith and Clark in their dissenting opinions maintained that by holding a 100-mile limitation inapplicable as a restraint on the taxation of travel expenses the Second Circuit was approaching the English system of taxing costs (T 75, 83; 324 F. 2d at 365, 370). Under the English system all necessary expenses of maintaining an action are taxable against the unsuccessful litigant except

that expenses "'incurred or increased through over-caution, negligence or mistake or by payment of special fees to counsel or special charges or expenses to witnesses or other persons, or by other unusual expenses' shall be disallowed." Goodhart, *Costs*, 38 Yale L. J. 849, 856 (1929).

Actually the rejection of a 100-mile limitation only is an approach to the system which applies to other costs taxable under 28 U. S. C. §1920,[23] and to the system which a series of well reasoned cases first established in the United States Courts. *The Gov. Ames*, 187 Fed. 40 (C. A., 1st Cir. 1910, Putnam, J.), *cert. denied* 223 U. S. 725 (1911); *Jesse D. Carr Land & Live Stock Co.* v. *United States*, 118 Fed. 821, 824 (C. A., 9th Cir. 1902, DeHaven, J.); *The City of Augusta*, 80 Fed. 297 (C. A., 1st Cir. 1897, Putnam, J.); *Hunter* v. *Russell*, 59 Fed. 964 (C. C. D. Mont. 1894, Knowles, J.); *United States* v. *Sanborn, supra; Anderson* v. *Moe*, 1 Fed. Cas. 844 (No. 359) (C. C. E. D. Mich. 1869, Withey, J.); *Hathaway* v. *Roach*, 11 Fed. Cas. 818 (No. 6,213) (C. C. D. Mass. 1846, Woodbury, J.); *Whipple* v. *Cumberland Cotton Co.*, 29 Fed. Cas. 933 (No. 17,515) (C. C. D. Me. 1844, Story, J.); *Prouty* v. *Draper, supra.*

Prouty v. *Draper, supra*, was the first federal case decided in the United States on the question of expenses of travel for witnesses brought from beyond 100 miles of the place of trial. There Mr. Justice Story held these travel expenses where found to be necessary, were taxable against the unsuccessful litigant. He stated, referring to the Act of September 24, 1789, c. 20, §30, 1 Stat. 88[24], which allowed the testimony of witnesses more than 100 miles from the place of trial to be taken by deposition:

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[23] See the cases listed in footnote 22 *supra.*

[24] The statutory predecessor of Federal Rule of Civil Procedure 26(d)(3).

> "The act is not peremptory that, under such circumstances, the depositions of the witnesses shall be taken and used, but only that they may be taken and used. It is therefore a mere option given to the party who wishes to use the testimony of the witnesses. In many cases the presence of the witnesses in person, and their oral testimony on the stand, may be indispensable to the true exposition of the merits of the case. No deposition would or could meet all the exigencies which might arise from the varying character of the evidence, or the necessity of instant explanation of circumstances not previously known or understood. • • • In my judgment, therefore, there is no ground to say that the full costs of the personal travel and attendance of the witnesses ought not to be allowed in the costs. • • • [Allowing trial courts discretion to tax necessary travel expenses] seems to be putting the whole doctrine upon a sound and rational foundation, and enables the courts at once to accomplish the purposes of justice, and to prevent the accumulation of unnecessary or extravagant expenses". (20 Fed. Cas. at 13, 14).

Similarly in *Hathaway* v. *Roach, supra,* Mr. Justice Woodbury approved the rule allowing taxation of travel expenses beyond 100 miles from place of trial and, referring to the Act of February 28, 1799, c. 19, §6, 1 Stat. 626,[25] which provided witness fees of 5¢ a mile, stated:

> "As I understand this act of Congress of February 28, 1799, it is imperative on this point, and travel has been allowed beyond the line of the state in such cases by my predecessor after full hearing and deliberation. Whipple *v.* Cumberland Manuf'g Co. [Case No. 17,515]". (11 Fed. Cas. at 820).

[25] The statutory predecessor of 28 U. S. C. §1821.

And in *United States* v. *Sanborn, supra,* Mr. Justice Gray analyzed the purpose of Revised Statutes 876 (former 28 U. S. C. §654, 42 Stat. 848),[26] which allowed subpoenas for witnesses to run 100 miles from the place of trial into another district, and concluded:

> "There seems to us to be quite as much reason for taxing the travel of a witness from the place of his residence to the place of trial in the case in which he could not have been summoned as in the case in which he might have been and was not" (28 Fed. at 304).

In contrast with the foregoing well reasoned decisions the cases on which a 100-mile limitation on taxable witness fees is based, *Dreskill* v. *Parish,* 7 Fed. Cas. 1069 (No. 4,076) (C. C. D. Ohio 1851) and *Anonymous,* 1 Fed. Cas. 992 (No. 432) (C. C. S. D. N. Y. 1863), were decided summarily, without any apparent awareness of the earlier contrary decisions and without any analysis of the statutes involved or the reasons for such a limitation. *United States* v. *Sanborn,* 28 Fed. at 303.

Even if the position of the majority of the Court of Appeals in this case were an approach to the English system of taxing costs this provides no reason for denying that right to tax necessary travel expenses which statute and policy demands. Circuit Judge Clark cites[27] 38 Yale L.J. 849, 872-877 (1929) where, after extended analysis of the English system of taxing costs, it is concluded, contrary to Judge Clark's opinion, that the English system does not favor the wealthy but favors the poor.

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[26] Which re-enacted the Act of March 2, 1793, c. 22, §6 (1 Stat. 335) and is the statutory predecessor of Federal Rule of Civil Procedure 45(e)(1).

[27] T 83 n. 2; 324 F. 2d at 370 n. 2.

Certainly there is nothing as a practical matter which commends a 100-mile limitation in its present application. The arbitrariness of this limitation is illustrated by the fact that an unsuccessful party may bear part of the expenses of travel for a witness from outside the district only up to 100 miles, and at the same time bear a much greater expense for travel substantially in excess of 100 miles by a witness within the district. 64 Col. L. Rev. 955, 960 (1964).

Furthermore, with regard to distance traveled within the district by a witness from without, 64 Col. L. Rev. 955, 960, 961 n. 47 (1964) points out that:

> "... for a witness traveling, for example, from Reno, Nevada, to San Diego, California—about 500 miles—, costs would be taxable for about 360 miles; whereas, for a witness traveling the same distance from Arizona or New Mexico costs would be taxable only for about 175 miles."

Because of the oblong shape of the district encompassing San Diego a witness travelling from Reno, near the northern end of the district, travels a far greater distance within the district, hence a greater taxable distance, than a witness travelling West from Arizona or New Mexico.

There certainly can be little justification for a rule which in many cases makes taxable travel expenses depend more on direction than distance traveled to court.

Furthermore, the arbitrariness of a 100-mile limitation is illustrated by the fact that a 100-mile limitation is applied regardless of whether a witness attends with or without subpoena. See, e.g., *Kemart Corp.* v. *Printing Arts Research Lab.*, 232 F. 2d 897, 904 (C. A., 9th Cir. 1956, Stephens, J.); *Spiritwood Grain Co.* v. *Northern Pac. Ry. Co.*, 179 F. 2d at 344. 64 Col. L. Rev. 955, 960 (1964) states:

> "Once the courts determined that costs would be taxable even though the witness attended volun-

> tarily, little justification remained for limiting taxable mileage to the reach of the subpoena power * * *".

Similarly in *Bank of America* v. *Loew's International Corporation, supra,* District Judge Dawson in taxing as costs the round trip air fare of three witnesses brought from England, stated:

> "* * * It is well established that transportation expenses of witnesses will be taxed as costs, even though a witness has not been subpoenaed. Spirtwood Grain Co. *v.* Northern Pac. Ry. Co., 8 Cir., 1950, 179 F. 2d 338; Vincennes Steel Corp. *v.* Miller, supra, 94 F. 2d at page 350; Hansen *v.* Bradley, D. C. Md. 1953, 114 F. Supp. 382; Gallagher *v.* Union Pac. R. Co., D. C. S. D. N. Y. 1947, 7 F. R. D. 208; 20 C. J. S. Costs §228. Therefore, the question as to whether a witness has traveled a distance greater than the distance for which he may be subpoenaed seems to be irrelevant as to determination of the issue." (163 F. Supp. at 929).

It is therefore submitted that the Court of Appeals correctly rejected a 100-mile limitation on taxable travel expenses; a limitation contrary to the clear statutory language of Federal Rule of Civil Procedure §54(d), 28 U. S. C. §1920 and amended 28 U. S. C. §1821, unsupported by the rationale of the subpoena power and right to use depositions, and productive of only the most unjust and arbitrary results.

III. Total travel expenses of defendant's material and necessary witnesses should be taxed as costs against the unsuccessful plaintiff where plaintiff or his witnesses testified falsely or where defendant's witnesses had to be transported from distant places to rebut testimony plaintiff or his witnesses changed on trial.

The theory that the right to take depositions justifies limiting taxable travel expenses to the federal court district or 100 miles from the place of trial falls down completely in this action. The claim in the testimony of Farmer regarding Faddoul, the Lebanese nurse employed by Aramco in Saudi Arabia, was never mentioned by Farmer in his examination before trial. Farmer *first* referred to Faddoul in the course of his testimony on the first trial. Faddoul had to be called from Saudi Arabia to testify in both the first and second trials *solely* because of statements made by Farmer for *the first time* at trial relative to the question as to whether or not Farmer had received the results of a blood count and urinalysis before performing the unprofessional operation for which the jury found he was discharged[28]. Similarly the testimony of Doctors Page, Born and Lohnaas was necessary on the first trial because on the first trial Farmer changed the testimony he had given in his examination before trial regarding conversations relating to his discharge and intimated that his discharge was a frameup by these doctors[29]. And the testimony of Doctors Page, Born and Lohnaas was necessary on the second trial because at the second trial *for the first time* Farmer implied that Drs. Lohnaas, Page, and Born had conspired to falsify wilfully the records of the surgery

[28] See Aramco's Statement of Facts, pages 10-12 *supra*.

[29] See Aramco's Statement of Facts, pages 13, 14 *supra*.

department at Aramco's hospital in Saudi Arabia with regard to whether or not the blood and urinalysis had been taken[30].

Furthermore, due to the unpredictability of Farmer's testimony on trial and his willingness to alter his testimony regarding events in Saudi Arabia when the only witnesses were at a great distance from the place of trial, it is clear that depositions could not have substituted for live witnesses even with regard to the testimony that Farmer did not change or introduce for the first time at trial.

Under these circumstances there can be no justification for denying travel expenses on the basis of the right to use depositions, whatever justification there may be in some commercial litigation where the case does not depend upon the weighing of the credibility of opposing witnesses and no new witnesses are mentioned or fundamental testimony changed for the first time on trial.

In this action Farmer introduced no testimony but his own as to the events in Saudi Arabia and Aramco's witnesses were brought to trial solely to rebut this testimony. The jury in returning a verdict for Aramco must, therefore, have disbelieved Farmer's testimony and instead believed Aramco's witnesses with regard to material aspects of Farmer's case.

The fact that Farmer based his case on falsehoods is a most important consideration in this action. Farmer should not be allowed to avoid the payment of total travel expenses of witnesses transported to New York as a result of and to contradict his false testimony. Indeed, the jury finding that Farmer testified falsely with respect to material facts, irrebuttably demonstrates that Aramco could not

[30] *Ibid.*

rely on depositions but had to prove the true facts by witnesses at trial whose credibility could be weighted against that of Farmer.

The theory that taxing total travel expenses limits access to the federal courts falls down completely where a party bases his case on falsehoods. In such a situation to tax the expenses of necessary witnesses coming from beyond 100 miles of the place of trial will only discourage parties from testifying falsely and basing their cases on falsehoods. It will not discourage parties from litigating honest claims.

The taxation of necessary travel expenses beyond a 100-mile limit where a party bases his case on falsehoods finds supporting precedent in Federal Rule of Civil Procedure 37(c). This Rule provides:

> "*Expenses on Refusal to Admit.* If a party, after being served with a request under Rule 36 to admit the genuineness of any documents or the truth of any matters of fact, serves a sworn denial thereof and if the party requesting the admissions thereafter proves the genuineness of any such document or the truth of any such matter of fact, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making such proof, including reasonable attorney's fees. Unless the court finds that there were good reasons for the denial or that the admissions sought were of no substantial importance, the order shall be made."

In this action Aramco could not have successfully requested an admission from Farmer under Rule 36 that his employment was terminated because of his professional misconduct as Rule 36 applies only to facts which are undisputed and peripheral and here Farmer falsely disputed the facts. *Syracuse Broadcasting Corporation* v. *Newhouse*, 271

F. 2d 910, 917 (C. A., 2nd Cir. 1959, Waterman, J.). However, there seems no reason why federal judges, who in many situations are required to assess even attorney's fees under Rule 37(c) where a party fails to admit truth, should be denied the right to tax total travel expenses of necessary witnesses to and from the place of trial where a party testifies falsely.

Similarly, it is submitted, there appears to be little merit in Circuit Judge Clark's argument (T 82; 324 F. 2d at 369) that the denial to Aramco of security for costs in this action (*Farmer* v. *Arabian American Oil Co.*, 285 F. 2d 720) furnishes precedent for denying travel expenses. No valid basis exists for linking security for costs and travel expenses in this case. While requiring security for costs in some circumstances may prevent an action from being maintained, requiring payment of travel expenses where a party testifies falsely as in this action will only discourage falsehoods.

It is therefore submitted that even if there is any justification for a 100-mile limitation in other cases—which is denied—such is not present in this case; and that in any event it should be held that a 100-mile limitation is inapplicable where, as here, a party testifies falsely or on trial changes or threatens changes in testimony.

IV. It is an abuse of discretion for a federal district judge to limit the amount of witnesses' travel expenses taxed as costs against an unsuccessful party on the basis of the relative financial resources of the parties.

It is apparent that Judge Weinfeld limited the travel expenses of Aramco's witnesses to 100 miles largely on the basis that Aramco was a "rich litigant" in relation to

Farmer (T 54, 55; 31 F. R. D. at 193, 194). This holding of Judge Weinfeld seems, in effect, to have been approved by the Court of Appeals, for the Court of Appeals affirmed Judge Weinfeld's allowance of only sixteen dollars per witness for transporting Aramco's witnesses to New York for the second trial, while at the same time reinstating the actual expense of transporting Aramco's witnesses to the first trial as allowed by Judge Palmieri. Furthermore, the Court of Appeals stated that the presence of Aramco's witnesses at both the first and second trials was "essential" (T 72; 324 F. 2d at 364), but indicated that in certain cases the actual expenses of transporting witnesses to the place of trial can be limited on the basis "of the relative financial resources of the parties" (T 71; 324 F. 2d at 363).

The subsequent holding of the Court of Appeals for the Second Circuit in *Nuzzo* v. *Rederi A/S Wallenco, Stockholm, Sweden, supra,* where the Court of Appeals allowed as costs the total expense of transporting a witness to the place of trial from Sweden, supports the supposition that the Court of Appeals in this action failed to reverse Judge Weinfeld's denial of total travel expenses because of the relative financial resources of Aramco.

Nuzzo involved a $150,000 claim for negligence and unseaworthiness against a Swedish shipping line, based on injury to a longshoreman from stowage of cargo on a Swedish vessel, the SS. *Boheme.* Plaintiff, Nuzzo, and two other longshoremen testified as to the condition on board the SS. *Boheme* and the former Chief Officer of the SS. *Boheme,* Lundquist, who had been in charge of the stowage, was flown from Stockholm to rebut this testimony. After trial Nuzzo's complaint was dismissed (304 F. 2d 506, rehearing and rehearing *in banc* denied 304 F. 2d 514) and District Judge Rosling taxed costs against the plaintiff. Judge Rosling limited travel expenses for Lundquist to 8¢ per mile for 100 miles to and from court.

The Court of Appeals reversed this decision *per curiam*, holding it was "an abuse of discretion" for Judge Rosling to have denied defendant the round trip airfare of Lundquist from Stockholm. 325 F. 2d at 995. The Court emphasized that the testimony of this witness was "material and necessary" stating:

> "Lundquist was the only member of the ship's company called to give defendant's version of the condition of the stow, in opposition to Nuzzo and two other longshoremen who testified in his behalf * * *." (*Ibid*).

As the testimony of Aramco's witnesses in the instant action was similarly found to be necessary, the different holdings of the Court of Appeals with regard to Judge Weinfeld's and Judge Rosling's denial of actual travel expenses can be explained only by the fact that Judge Weinfeld, unlike Judge Rosling, adverted to the relative financial resources of the parties. But this adds even more to the confusion, for it would seem that in *Nuzzo* there too was a difference in relative financial resources between the longshoreman plaintiff and the Swedish shipping line.

Most certainly the adoption of a rule that costs of a successful litigant may be limited on the sole basis of relative wealth is supported by neither public policy nor judicial authorities.

A. Policy.

The issue raised by basing costs on the relative financial resources of the parties is not the same as the problem of costs in a suit by a plaintiff in *forma pauperis*. It is admirable to relieve the lot of the poor, but no attempt was made by Farmer, who was earning at least $16,000 a year in Saudi

Arabia, to demonstrate he was a pauper. Nor it would seem was the Court of Appeals or Judge Weinfeld attempting to broaden the law (28 U. S. C. §1915) relieving poor persons of certain litigation costs. Indeed, 28 U. S. C. §1915 does not provide any different basis for ultimate taxation of costs in an action in *forma pauperis* than in any other action. See, e.g., *Perkins* v. *Cingliano*, 296 F. 2d 567, 568 (C. A., 4th Cir. 1961).

What the position of Judge Weinfeld in the case at bar does involve is the *relative* financial resources of parties; the question posed being whether costs should be denied to the wealthier in a suit by the less wealthy.

Fundamental questions in the administration of justice in the federal courts are raised by a holding which will result in the denial of costs to the wealthier of two parties merely because of relative financial resources. It is a basic American legal concept that "equal justice under law" extends to rich and poor alike. Mr. Justice Arthur J. Goldberg pointed out in a James Madison Lecture, given at New York University School of Law on February 11, 1964:[31]

> "Here as in other aspects of equality we derive our constitutional inspiration from the Bible: 'You shall do no injustice in judgment; you shall not be partial to the poor or defer to the great, but in righteousness shall you judge your neighbor.' [quoting from Leviticus 19:15] Justices of our Court and many state courts take an oath to 'do equal justice to the poor and to the rich.'"

Equal justice is seriously endangered if litigation costs, which may form a substantial portion of any recovery and are an integral part of the achievement of justice, can be determined on the basis of relative financial resources.

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[31] *Equality and Governmental Action*, delivered as the fifth annual James Madison Lecture. 39 N. Y. U. L. Rev. 205, 217 (1964).

A reversal of a holding that costs can be determined on the basis of relative financial resources is further made essential by the unjustifiable effect such a holding will have in encouraging litigation. As Professor Moore emphasizes, "The extent to which actual expenses are allowed as costs can have a significant effect upon encouragement or discouragement of litigation." 6 Moore's Federal Practice, Par. 54.70 [2], p. 1303.

The less wealthy party, secure in the knowledge that in the Second Circuit the relative financial resources of the parties is a factor in determining the allowance of costs, will be encouraged to sue, and to proceed to litigation on even the most unmeritorious claims. Moreover, there can be no doubt that the settlement process will be impeded if costs are awarded on the basis of the relative financial resources of the parties.

"Strike" suits will also be encouraged. The fact that a prevailing defendant may be denied his costs will make it far more likely the less wealthy party can obtain a sizeable settlement for "nuisance value," and thus he will be encouraged to bring unmeritorious actions.

A further practical disadvantage to the assessment of costs on the basis of the relative financial resources of the parties is the fact that this theory can be applied correctly only by requiring full disclosure of the parties' financial resources. This may entail the utilization of an unjustifiable amount of court time, even if it were otherwise proper to require full disclosure of the financial resources of the parties.

B. Authorities.

It has long been the general rule that the successful party is entitled to costs "which are allowed to the successful party by way of amends for his expense and trouble

in prosecuting [or defending] his suit." *Day* v. *Woodworth.* 13 How. (54 U. S.) 363, 372 (1851); 6 Moore's Federal Practice, Par. 54.70[3], p. 1304 (2nd Ed. 1963).

Prior to the Federal Rules of Civil Procedure, in the absence of a statutory provision otherwise specifying, the prevailing party in an action at law was entitled to costs as of right. *Ex Parte Peterson,* 253 U. S. 300, 317, 318 (1920); 6 Moore's Federal Practice, Par. 54.70[3], p. 1304. With the promulgation of Rule 54(d) of the Federal Rules of Civil Procedure discretion was given under 28 U. S. C. §1920 to allow or disallow costs to the prevailing party. However, other than this action, insofar as research has shown, courts have never interpreted Federal Rule of Civil Procedure 54(d) or 28 U. S. C. §1920 to hold that costs could be allowed or disallowed because of the relative financial resources of the parties. Cf. *Chicago Sugar Co.* v. *American Sugar Refining Co.,* 176 F. 2d 1, 11 (C. A., 7th Cir. 1949, Kerner, J.), *cert. denied* 338 U. S. 948 (1950); *Lichter Foundation, Inc.* v. *Welch,* 269 F. 2d 142, 146 (C. A., 6th Cir. 1959, Miller, J.). Indeed, the only criterion mentioned anywhere in 28 U. S. C. §1920 is necessity. 28 U. S. C. §1920(2),(4).

Heretofore federal courts have adhered to the position that "departure from the rule of awarding costs to the prevailing party should only be for good cause." 10 Cyclopedia of Federal Procedure, §38.17, p. 377 (3rd Ed. 1952). Only where the prevailing party has been guilty of some improper conduct in the course of the litigation have costs been denied. As stated by Circuit Judge Kerner in *Chicago Sugar Co.* v. *American Sugar Refining Co.,* 176 F. 2d at 11:

> "While there is no question that, under Rule 54(d), Rules of Civil Procedure, 28 U. S. C. A. which provides: 'Except when express provision

> therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; * * *' the court has discretion over the allowance of costs, we think the facts disclosed did not justify the exercise of that discretion. As we understand it, the denial of costs to the prevailing party or the assessment of partial costs against him *is in the nature of a penalty for some defection on his part* in the course of the litigation as, for example, by calling unnecessary witnesses, bringing in unnecessary issues or otherwise encumbering the record, or by delaying in raising objection fatal to the plaintiff's case. [citations omitted] A party, although prevailing, would be denied costs for needlessly bringing or prolonging litigation." (emphasis added.)

The ability of Aramco or any other prevailing party to pay its own costs is certainly not a "defection" for which "a penalty" should be imposed.

In *Lichter Foundation, Inc.* v. *Welch, supra*, a taxpayer won a large judgment against the Collector of Internal Revenue in an action for a tax refund. The taxpayer claimed costs of $2,165.40. However, the District Judge disallowed all costs except $5.00. The taxpayer took an appeal to the United States Court of Appeals for the Sixth Circuit. In its opinion the Court of Appeals, speaking through Judge Miller noted critically that it was the view of the District Judge that "since it was a discretionary matter with the Court and the appellant having recovered a huge judgment could amply afford to pay the costs in the case, he was exercising his discretion in the matter and limiting costs to $5." 269 F. 2d at 146. The Court of Appeals did not agree with this reasoning and reversed the District Court. In the opinion Judge Miller noted, apparently with

approval the argument of the successful appellant "that the allowance of only $5. as costs" instead of "actually expended costs in the approved amount of $2,165.40 is an abuse of discretion." 269 F. 2d at 144.

Similarly it should have been held an abuse of discretion for Judge Weinfeld to have limited Aramco's costs on the basis that Aramco was a "rich litigant."

V. It is an abuse of discretion for the judge on the second trial to review and reassess the costs taxed by the judge on the first trial, where there have been two trials of an action before different judges of a federal district court and neither trial resulted in a judgment for plaintiff.

In this action the Court of Appeals held that "it was an abuse of discretion" for District Judge Weinfeld, in taxing costs after the second trial, to have reduced the costs awarded by District Judge Palmieri on the first trial (T 75; 324 F. 2d at 365). Chief Judge Lumbard stated:

> "As the judge who presided at the first trial, Judge Palmieri had the greater opportunity to assess the necessity of particular costs incurred in defense of the action before him. This circumstance, considered in the light of the sensitive nature of the problems presented when one district judge is asked to pass upon the exercise of discretion by another, makes it inappropriate for a district judge to undertake an independent determination *de novo* of the costs allowed at a prior trial." (T 72; 364 F. 2d at 364).

Similarly, Circuit Judge Smith recognized in his dissent that "great deference should be given by the second judge to the opportunity of the first judge, here Judge Palmieri,

to weigh the situation then before him in assessing necessity." (T 80; 324 F. 2d at 368).

The validity of the conclusion that the judge on the second trial will not be able to weigh the necessity of expenses on the first trial as well as the judge on the first trial is well demonstrated by Judge Weinfeld's opinion. For example Judge Weinfeld stated, regarding costs on the first trial:

> "In the instant case the defendant had taken the plaintiff's pretrial deposition and so was aware of his contentions in support of his claim. It knew the witnesses it would rely upon to rebut his contentions. The testimony of any witness beyond the subpoena power of the Court could have been obtained by way of deposition, open commission, written interrogatories or letters rogatory." (T 57; 31 F. R. D. 195).

Certainly this was not true, as demonstrated earlier in this brief, with respect to the witnesses whose testimony was necessary to rebut testimony Farmer changed for the first time at trial, and at a time when he knew that the only witnesses knowing the truth were far from the place of trial.

Furthermore, while Federal Rule of Civil Procedure 54 (d) allows costs to be taxed in favor of the prevailing party, this only should necessitate a denial of the costs awarded a defendant on the first trial where the second trial, after a reversal on appeal of the verdict or judgment on the first trial, results in a verdict for the plaintiff. Thus courts have allowed the taxation of costs, and even motions seeking a retaxation of costs, while appeals were being considered on the merits. E.g., *Hoeth* v. *Stone*, 240 F. 2d 384, 387 (C. A., 9th Cir. 1957, Barnes, J.); *Independent Productions Corporation* v. *Loew's Incorporated*, 184 F. Supp. 671 (S. D. N. Y. 1960, McGohey, J.).

VI. The Court of Appeals was in error when it failed to affirm the award of costs made by Judge Palmieri at the first trial on the basis of the incremental costs to Aramco of transporting two necessary and material witnesses to and from the place of trial on its own planes.

The majority of the Court of Appeals disallowed the costs taxed by Judge Palmieri for transportation of Page and Swanson round-trip to the place of trial on Aramco planes from Saudi Arabia (T 73; 324 F. 2d at 364). Chief Judge Lumbard gave neither reason nor authority for this result, stating merely:

> "• • • Page and Swanson occupied otherwise empty space in company planes on regularly scheduled flights to and from Saudi Arabia, so that as to them there was no actual travel expense incurred by the company and none should have been allowed." (*Ibid.*).

But plainly Aramco did incur travel expense with regard to Page and Swanson. This is the age old problem in industry of incremental and indirect costs. Aramco submitted a detailed, uncontradicted affidavit to Judge Palmieri (T 26) showing the expense incurred by Aramco in maintaining its planes and showing that by proper accounting principles the actual cost of each flight round trip from Saudi Arabia was $1032.00. As stated in 112 U. Pa. L. Rev. 1076, 1081 n. 24 (1964):

> "It is unsophisticated cost allocation • • • to conclude that since Aramco incurred no out-of-pocket expenses it cost nothing to bring these witnesses from Saudi Arabia to New York. The pro rata assignment of air transportation expense by Aramco

> was legitimate and was considerably lower than the corresponding cost of commercial air travel."

Furthermore, even if it had cost Aramco nothing to fly Page and Swanson round trip from Saudi Arabia this is not a proper basis for denying taxable costs. 28 U. S. C. §1821 provides direct authority for allowing Aramco the lowest cost first class commercial air fare for witnesses transported from and to Saudi Arabia, regardless of the expense actually incurred. Aramco should, therefore, be allowed the lesser amount it seeks; the actual cost of transporting witnesses from and to Saudi Arabia on Aramco planes as computed in accordance with accepted accounting standards. As Circuit Judge Clark stated in his dissent:

> "• • • Except on the theory that two wrongs make a right, this [denial of travel expenses from and to Saudi Arabia for Page and Swanson] cannot be justified, for it is settled on the authorities that costs for witnesses legally due are taxable, whether they have been paid to the witness or not. The taxing authority cannot be expected to go into the issue whether the witness may not have appeared voluntarily, making no claims for fees." (T 82; 324 F. 2d at 369).

The overwhelming weight of authority supports Judge Clark in this respect. See, e.g., *Kemart Corporation* v. *Printing Arts Research Lab., supra; Spiritwood Grain Co.* v. *Northern Pac. Ry. Co., supra; Vincennes Steel Corporation* v. *Miller, supra.*

Even Judge Weinfeld taxed the same costs for Page and Swanson on the Aramco planes as for witnesses on commercial planes (8¢ per mile for 200 miles), thus recognizing the irrelevancy of whether Aramco had to pay for the

flights of Page and Swanson on the Aramco planes (T 63, 64).

There would seem to be no valid reason for penalizing Aramco with a denial of costs because of Aramco's choice to use a cheaper method of transportation than commercial airlines, and thus, indeed, to reduce the amount that would be taxable. The utilization of the cheapest method of transporting witnesses should be encouraged, not discouraged.

VII. The decision of the Court of Appeals which held that a judgment solely for costs is properly appealable should be held to be correct inasmuch as the issues raised require the resolution of basic questions of law.

It was Chief Judge Lumbard's holding that:

> "* * * [I]t is unquestionably true that the portion of the judgment relating to costs may be reviewed on appeal, for abuse of * * * discretion, if other issues are also raised. See e.g., Chemical Bank & Trust Co. *v.* Prudence-Bonds Corp., 207 F. 2d 67 (2 Cir. 1953), 347 U. S. 904, 74 S. Ct. 429, 98 L. Ed. 1063 (1954); Chicago Sugar Co. *v.* American Sugar Refining Co., 176 F. 2d 1 (7 Cir. 1949), cert. denied 338 U. S. 948, 70 S. Ct. 486, 94 L. Ed. 584 (1950). We see no reason why we should not hear an appeal from this element alone. It is surely a final judgment within the meaning of 28 U. S. C. §1291. See Donovan *v.* Jeffcott, 147 F. 2d 198 (9 Cir. 1945). We hold that when, as here, the question is not whether the district judge should have allowed or disallowed particular items of costs, but is rather whether he exceeded, and therefore abused, his discretion, a judgment solely for costs is appealable. Lichter Foundation, Inc. *v.* Welch, 269 F. 2d 142 (6

Cir. 1959); Kemart Corp. *v.* Printing Arts Research Laboratories, 232 F. 2d 897 (9 Cir. 1956); Prudence-Bonds Corp. *v.* Prudence Realization Corp., 174 F. 2d 288 (2 Cir. 1949); Harris *v.* Twentieth Century-Fox Film Corp., 139 F. 2d 571 (2 Cir. 1943); 6 Moore, Federal Practice 1309 (1953).'"[32] (T 67, 68; 324 F. 2d 361, 362.)

Newton v. *Consolidated Gas Co.*, 265 U. S. 78 (1924), the principal case in this regard relied on by Farmer in his petition for certiorari, though distinguishable[33], is authority for the proposition that an appeal will lie from a judgment solely for costs. This Court there dealt with a discretionary award of costs and a conflict between various circuits regarding whether the premiums on surety bonds were taxable as costs.

Similarly, the instant action deals with the taxability of travel expenses beyond the scope of the subpoena power, a question as to which various courts are in conflict, and involves an abuse of discretion by Judge Weinfeld in failing to adhere to the costs awarded by Judge Palmieri on the first trial, as well as the other questions dealt with in this brief.

Moreover, the fundamental questions of law raised in this case concerning the construction of statutes and the effect of positive rules of law should be determined and resolved on appeal regardless of whether costs in the usual situation are appealable. See *The City of Augusta*, 80 Fed. at 303.

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[32] This holding is clearly correct. See, e.g., 64 Col. L. Rev. 955, 958 n. 29 (1964) and cases therein cited.

[33] *Newton* v. *Consolidated Gas Co., supra*, is distinguishable both in that it was decided prior to the adoption of Federal Rule of Civil Procedure 54(d) and that it was an equity action where, unlike the case at bar, the award of costs was not based on statutes.

Conclusion.

The judgment of the Court of Appeals for the Second Circuit should be remanded with instructions to allow all costs taxed by Judge Palmieri on the first trial, and to allow as costs the total round-trip travel expenses incurred by Aramco in transporting witnesses to the second trial.

Dated: August 24, 1964.

Respectfully submitted,

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Appendix.

Rule 26. Depositions Pending Action.

* * * * * *

(d) Use of Depositions. At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence, may be used against any party who was present or represented at the taking of the deposition or who had due notice thereof, in accordance with any one of the following provisions:

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: 1, that the witness is dead; or 2, that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition of or that the witness is unable to attend or testify because of age, sickness, infirmity, or imprisonment; and that the party offering the deposition has been unable to procure the attendance of the witness by subpœna; or 3, upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

Rule 37. Refusal to Make Discovery: Consequences.

* * * * * *

(c) Expenses on Refusal to Admit. If a party, after being served with a request under Rule 36 to admit the genuineness of any documents or the truth of any matters of fact, serves a sworn denial thereof and if the party requesting the admissions thereafter proves the genuineness of any such document or the truth of any such matter of fact, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred

in making such proof, including reasonable attorney's fees. Unless the court finds that there were good reasons for the denial or that the admissions sought were of no substantial importance, the order shall be made.

RULE 45. SUBPOENA.

* * * * * *

(e) SUBPOENA FOR A HEARING OR TRIAL.

(1) At the request of any party subpoenas for attendance at a hearing or trial shall be issued by the clerk of the district court for the district in which the hearing or trial is held. A subpoena requiring the attendance of a witness at a hearing or trial may be served at any place within the district, or at any place without the district that is within 100 miles of the place of the hearing or trial specified in the subpoena; and, when a statute of the United States provides therefor, the court upon proper application and cause shown may authorize the service of a subpoena at any other place.

RULE 54. JUDGMENTS; COSTS.

* * * * * *

(d) COSTS. Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law. Costs may be taxed by the clerk on one day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court.

28 U. S. C.

§1821. PER DIEM AND MILEAGE GENERALLY: SUBSISTENCE

A witness attending in any court of the United States, or before a United States commissioner, or before any

person authorized to take his deposition pursuant to any rule or order of a court of the United States, shall receive $4 for each day's attendance and for the time necessarily occupied in going to and returning from the same, and 8 cents per mile for going from and returning to his place of residence. Regardless of the mode of travel employed by the witness, computation of mileage under this section shall be made on the basis of a uniform table of distances adopted by the Attorney General. Witnesses who are not salaried employees of the Government and who are not in custody and who attend at points so far removed from their respective residence as to prohibit return thereto from day to day shall be entitled to an additional allowance of $8 per day for expenses of subsistence including the time necessarily occupied in going to and returning from the place of attendance: *Provided*, That in lieu of the mileage allowance provided for herein, witnesses who are required to travel between the Territories and possessions, or to and from the continental United States, shall be entitled to the actual expenses of travel at the lowest first-class rate available at the time of reservation for passage, by means of transportation employed: *Provided further*, That this section shall not apply to Alaska.

When a witness is detained in prison for want of security for his appearance, he shall be entitled, in addition to his subsistence, to a compensation of $1 per day.

§1915. PROCEEDINGS IN FORMA PAUPERIS

(a) Any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees and costs or security therefor, by a person who makes affidavit that he is unable to pay such costs or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that he is entitled to redress.

An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith.

(b) In any civil or criminal case the court may, upon the filing of a like affidavit, direct that the expense of printing the record on appeal, if such printing is required by the appellate court, be paid by the United States, and the same shall be paid when authorized by the Director of the Administrative Office of the United States Courts.

(c) The officers of the court shall issue and serve all process, and perform all duties in such cases. Witnesses shall attend as in other cases, and the same remedies shall be available as are provided for by law in other cases.

(d) The court may request an attorney to represent any such person unable to employ counsel and may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious.

(e) Judgment may be rendered for costs at the conclusion of the suit or action as in other cases, but the United States shall not be liable for any of the costs thus incurred. If the United States has paid the cost of a stenographic transcript or printed record for the prevailing party, the same shall be taxed in favor of the United States.

§1920. Taxation of costs

A judge or clerk of any court of the United States may tax as costs the following:

(1) Fees of the clerk and marshal;

(2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;

(3) Fees and disbursements for printing and witnesses;

(4) Fees for exemplification and copies of papers necessarily obtained for use in the case;

(5) Docket fees under section 1923 of this title.

A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree.

§1924. Verification of bill of costs

Before any bill of costs is taxed, the party claiming any item of cost or disbursement shall attach thereto an affidavit, made by himself or by his duly authorized attorney or agent having knowledge of the facts, that such item is correct and has been necessarily incurred in the case and that the services for which fees have been charged were actually and necessarily performed.

§1925. Admiralty and maritime cases

Except as otherwise provided by Act of Congress, the allowance and taxation of costs in admiralty and maritime cases shall be prescribed by rules promulgated by the Supreme Court.

The Act of September 24, 1789, c. 20, §30 (1 Stat. 88)

Sec. 30. *And be it further enacted*, That the mode of proof by oral testimony and examination of witnesses in open court shall be the same in all the courts of the United States, as well in the trial of causes in equity and of admiralty and maritime jurisdiction, as of actions at common law. And when the testimony of any person shall be necessary in any civil cause depending in any district in any court of the United States who shall live at a greater distance from the place of trial than one hundred miles, or is bound on a voyage to sea, or is about to go out of the United States, or out of such district, and to a greater distance from the place of trial than as aforesaid, before the time of trial, or is ancient or very infirm, the deposition of such person may be taken *de bene esse* before any justice or judge of any of the courts of the United States, or before

any chancellor, justice or judge of a supreme or superior court, mayor or chief magistrate of a city, or judge of a county court or court of common pleas of any of the United States, not being of counsel or attorney to either of the parties, or interested in the event of the cause, provided that a notification from the magistrate before whom the deposition is to be taken to the adverse party, to be present at the taking of the same, and to put interrogatories, if he think fit, be first made out and served on the adverse party or his attorney as either may be nearest, if either is within one hundred miles of the place of such caption, allowing time for their attendance after notified, not less than at the rate of one day, Sundays exclusive, for every twenty miles travel. And in causes of admiralty and maritime jurisdiction, or other cases of seizure when a libel shall be filed, in which an adverse party is not named, and depositions of persons circumstanced as aforesaid shall be taken before a claim be put in, the like notification as aforesaid shall be given to the person having the agency or possession of the property libelled at the time of the capture or seizure of the same, if known to the libellant. And every person deposing as aforesaid shall be carefully examined and cautioned, and sworn or affirmed to testify the whole truth, and shall subscribe the testimony by him or her given after the same shall be reduced to writing, which shall be done only by the magistrate taking the deposition, or by the deponent in his presence. And the depositions so taken shall be retained by such magistrate until he deliver the same with his own hand into the court for which they are taken, or shall, together with a certificate of the reasons as aforesaid of their being taken, and of the notice if any given to the adverse party, be by him the said magistrate sealed up and directed to such court, and remain under his seal until opened in court. And any person may be compelled to appear and depose as aforesaid in the same manner as to appear and testify in court. And in the trial of any cause of admiralty or maritime jurisdiction in a dis-

trict court, the decree in which may be appealed from, if either party shall suggest to and satisfy the court that probably it will not be in his power to produce the witnesses there testifying before the circuit court should an appeal be had, and shall move that their testimony be taken down in writing, it shall be so done by the clerk of the court. And if an appeal be had, such testimony may be used on the trial of the same, if it shall appear to the satisfaction of the court which shall try the appeal, that the witnesses are then dead or gone out of the United States, or to a greater distance than as aforesaid from the place where the court is sitting, or that by reason of age, sickness, bodily infirmity or imprisonment, they are unable to travel and appear at court, but not otherwise. And unless the same shall be made to appear on the trial of any cause, with respect to witnesses whose depositions may have been taken therein, such depositions shall not be admitted or used in the cause. *Provided,* That nothing herein shall be construed to prevent any court of the United States from granting a *dedimus potestatem* to take depositions according to common usage, when it may be necessary to prevent a failure or delay of justice, which power they shall severally possess, nor to extend to depositions taken in *perpetuam rei memoriam,* which if they relate to matters that may be cognizable in any court of the United States, a circuit court on application thereto made as a court of equity, may, according to the usages in chancery direct to be taken.

THE ACT OF MARCH 2, 1793, c. 22 §6 (1 Stat. 335)

SEC. 6. *And be it further enacted,* That subpœnas for witnesses who may be required to attend a court of the United States, in any district thereof, may run into any other district: *Provided,* That in civil causes, the witnesses living out of the district in which the court is holden, do not live at a greater distance than one hundred miles from the place of holding the same.

Appendix.

THE ACT OF FEBRUARY 28, 1799, c. 19, §6 (1 Stat. 626)

SEC. 6. *And be it further enacted,* That the compensation to jurors and witnesses, in the courts of the United States, shall be as follows, to wit: to each grand and other juror, for each day he shall attend in court, one dollar and twenty-five cents; and for travelling, at the rate of five cents per mile, from their respective places of abode, to the place where the court is holden, and the like allowance for returning; to the witnesses summoned in any court of the United States, the same allowance as is above provided for jurors.

NEW YORK SOUTHERN AND EASTERN DISTRICT LOCAL CIVIL RULE 5(a)

When a proposed deposition upon oral examination, including a deposition before action, or pending appeal, is sought to be taken at a place more than 100 miles from the courthouse, the court may provide in the order therefor, or in any order entered under Rule of Civil Procedure 30(b), that prior to the examination the applicant pay the expense of the attendance at the place where the deposition is to be taken of one attorney for each adversary party, or expected party, including a reasonable counsel fee. The amounts so paid shall be a taxable cost in the event that the applicant recovers costs of the action or proceeding.

ADMIRALTY RULE 47

Traveling expenses of any witness for more than one hundred miles to and from the court or place of taking the testimony shall not be taxed as costs.